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Volume 11

1978

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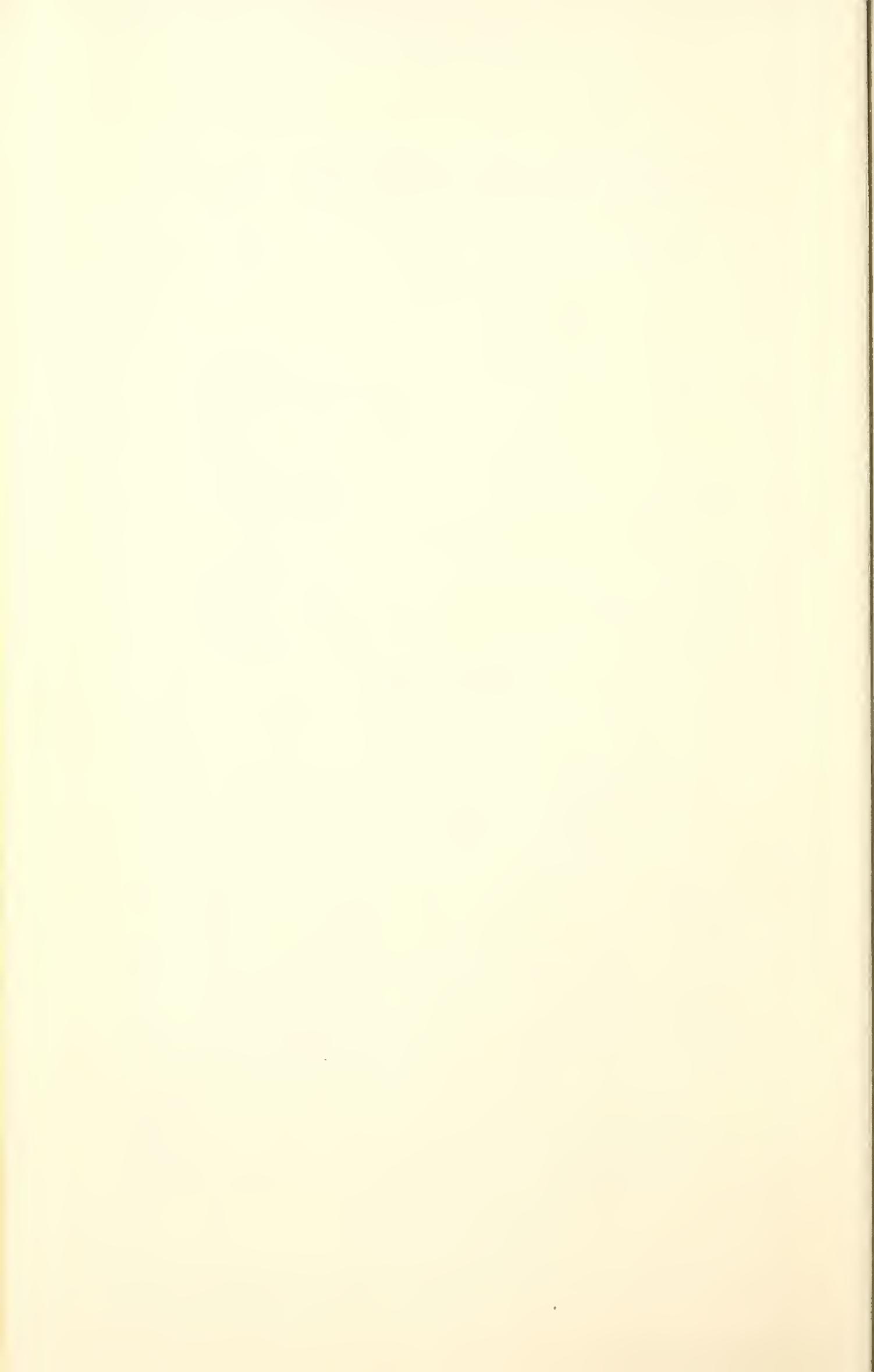
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In Tribute: John S. Grimes

*Charles D. Kelso**

*There is no such thing as a partially executed will.***

Thus did John S. Grimes bring life to property and property to life. To those of us who have been with this law school for many years, it seems incredible that because of retirement John is no longer going to be a daily part of it. He will go on teaching through his writings, but the curtain has fallen on his masterful performances in the classroom.

A good teacher should be something of an actor. John was Shakespearian. The King of England could not have pronounced his decrees with greater vigor than the common law was announced or denounced by Professor Grimes. His staccato delivery provided a perfect backdrop for his vivid allusions, his pungent examples, and the great sweep of background into which he fit the doctrines of the common law.

His impact on students and his colleagues resulted from the fusion of five great strengths. The first is his razor-sharp intellect, evidenced early by graduating in 1929 from Indiana University with distinction (and Phi Beta Kappa). In 1931, he was graduated with distinction from the Indiana University School of Law, having been Coif, Editor-in-Chief of the *Indiana Law Journal*, and number one in his class.

To an intellect so honed, John added years of experience in the practice of law as Attorney and Assistant General Counsel of the Farm Credit Administration of Louisville; General Council of the Indiana Farm Bureau, Inc. and Affiliated Organizations; and General Counsel of General Grain, Inc. and Affiliates. Though his first love is English property law prior to the 1800's, he could always show how current issues in the courts and in law offices were closely analogous to or actually controlled by distinctions and rules that had their origin in early English common law or statutes. If they were not so related, he would show what changes in society had led to changes in the law.

To the combination of powerful intellect and wide-ranging practice experience, John Grimes added the fruits of copious scholarship. His students were hearing from a man who had surveyed the entire field and who had distilled for them the most important highlights and their relation to one another and to society. His works, usually multi-volumed, include: G. Thompson, *Commentaries on the Modern Law of Real Property* (repl. ed. J. Grimes 1964); G. Henry, *The Pro-*

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**John S. Grimes.

bate Law and Practice of the State of Indiana (6th ed. J. Grimes 1954); and F. Clark, *Law of Surveying and Boundaries* (3d & 4th ed. J. Grimes 1959, 1976). In addition, he has published numerous law review articles on property, future interests, and probate.

A fourth ingredient in the Grimes magic has been his interest in law reform. John has been Chairman of the Indiana Judicial Council; a member of the Indiana Trust Code Study Commission; a member of the Indiana Probate Code Study Commission; a fellow in the American College Probate Council; a member of the National Association on Surveying and Mapping; and a member of the American, Indiana, and Indianapolis Bar Associations. Thus, he has been in a position to talk knowledgeably on how reform has come about, what reform is in the offing, and how past efforts have either succeeded or fallen short.

The fifth ingredient is the intangible factor of enthusiasm. John taught law with a relish. He really loves the law—and it showed. In class, in the hallway, or at lunch, he was ready at a moment's notice to explain how England had been saved from revolution by its property laws, how property law related to the industrial revolution, and the social and economic effects of enclosure.

Never was he unsure. If the law was clear, John would state it clearly. If the law was in a state of doubt, John would build with relish upon the extent of that doubt and the reasons for alternative resolutions. If John gravely said, "I don't know the answer," it seemed clear that no one knew and that perhaps the whole matter was unknowable until legal evolution had proceeded another step or two.

He loved legal problems; he revelled in the processes of legal growth. Yet, I believe that the greatest impact of his mind on law students was to enhance their understanding of the social significance of organized legal doctrine. He hammered away on the idea that the common law of property was a bulwark of civilization and a high point in our profession's achievements. He made students proud to think of themselves as future lawyers and made them eager to join the long succession of people who have been members of our profession.

John's written works will be teaching practicing lawyers for years to come. However, perhaps his most important legacy is in several generations of lawyers—almost thirty years of students who carried into the practice some of the intellectual and humanistic characteristics of Professor Grimes. John is a person who has lived the life of the law in grand style. He has captured that style in his teaching and instilled the same style in his students and colleagues.

It is a pleasure to join in dedicating this issue of the *Indiana Law Review* to the continued contributions of Professor John S. Grimes.

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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its fifth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1976, through May 31, 1977. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Indiana's New and Revised Criminal Code

*William A. Kerr**

Indiana's Bicentennial Criminal Code¹ finally became effective on October 1, 1977, just three months after the date that it was originally to have become effective.² Although it is a completely new code, it is also a thoroughly revised code because of the manner in which it was enacted. The code was originally enacted during the 1976 session of the General Assembly, but its effective date was delayed until July 1, 1977, to permit further study of the code's provisions.³ A Criminal Code Interim Study Commission was then established to review the code and to make recommendations for

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¹The Criminal Code was originally enacted in 1976 during the celebration of the nation's bicentennial. See Pub. L. No. 148, 1976 Ind. Acts 718; Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1 (1976) [hereinafter cited as Kerr, *Indiana's Bicentennial Criminal Code*]. The term "Criminal Code" is used with reference to this codification of criminal statutes although it is recognized that this is only one section of the entire "Indiana Code" and that criminal statutes do appear in other parts of the general code.

²See Pub. L. No. 340, § 151, 1977 Ind. Acts 1533, 1611.

³See Pub. L. No. 148, § 28, 1976 Ind. Acts 718, 817.

changes by the General Assembly.⁴ This Commission's extensive study resulted in a thorough revision of the entire code by the 1977 General Assembly, so thorough, in fact, that virtually the entire code was reprinted and reenacted in an amended version.⁵ Pursuant to the Commission's recommendation, the effective date was also delayed from July 1, 1977, to October 1, 1977, to facilitate distribution of the code and further preparation for implementing its adoption and use.⁶

As finally enacted, the new and revised code generally reflects the changes recommended by the Interim Study Commission. Other proposed changes were submitted to the General Assembly, including a proposal to repeal the entire code,⁷ but only a limited number were approved. Three of the proposals that were approved, however, do have major significance with reference to the sentencing provisions. One provision gives the trial judge authority to impose concurrent or consecutive sentences in his discretion, with only limited exceptions.⁸ This substantially changes Indiana's prior law, which generally provided for concurrent sentencing,⁹ and makes Indiana's sentencing procedures similar to those followed by the federal courts.¹⁰ Another provision authorizes the trial judge to consider the fact that a victim was sixty-five years of age or over, or was mentally or physically infirm in determining an appropriate sentence.¹¹ A third provision makes a convicted person liable for costs separate and apart from any sentence imposed and prohibits the suspension of costs by a court.¹²

⁴The Commission was established by an Executive Order of the Governor on April 2, 1976.

⁵Pub. L. No. 340, 1977 Ind. Acts 1533. The only sections not reprinted and reenacted were the provisions concerning the classification and registration of drugs and controlled substances. IND. CODE §§ 35-48-2-1 to -13, 35-48-3-1 to -9 (Supp. 1977); Pub. L. No. 148, § 7, 1976 Ind. Acts 718, 762-83. [Citations herein to IND. CODE are to the 1976 official edition of the Indiana Code. Citations to "Supp. 1977" are to the 1977 official edition supplement to the official 1976 Indiana Code.] The Commission submitted five proposed statutes: Ind. S. 84, 93, 199, 200, & 1267, 100th Gen. Assem., 1st Sess. (1977). All were enacted except Ind. S. 1267, 100th Gen. Assem., 1st Sess. (1977), which was enacted in part only.

⁶Pub. L. No. 340, § 151, 1977 Ind. Acts 1533, 1611.

⁷Ind. H.R. 1516, 100th Gen. Assem., 1st Sess. (1977).

⁸IND. CODE § 35-50-1-2 (Supp. 1977).

⁹See Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 32.

¹⁰See, e.g., *United States v. Wenger*, 457 F.2d 1082, 1083-84 (2nd Cir.), *cert. denied*, 409 U.S. 843 (1972); 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 527, at 419-20 (1969).

¹¹IND. CODE § 35-4.1-4-7 (Supp. 1977). This provision was placed in the Criminal Procedure Code instead of in the sentencing provisions of the Criminal Code.

¹²*Id.* § 35-50-1-3.

The major changes that are included in the new and revised code may be divided into four general categories. These include changes in style, revisions in the sections concerning defenses, changes in the definitions of various offenses, and changes in the sentencing provisions. In addition, certain provisions have been added to the code by the reenactment of statutes that were repealed and omitted from the code in 1976 and by the transfer of provisions into the code from other sections of the general Indiana statutes.

A. Changes in Style

One of the most extensive changes in the code is simply a matter of style: the naming of an offense within the provision defining the offense. In the original 1978 code, the names of the offenses were included as titles but were not included within the definitions of the various offenses.¹³ In the revised version, the names of the offenses are inserted at the end of the various definitions.¹⁴ Although this change appears to be minor, it did necessitate a revision of a substantial number of the sections in the code. The titles of four offenses were also changed by the addition of the word "criminal" in order to designate the offenses as "criminal confinement,"¹⁵ "criminal deviate conduct,"¹⁶ "criminal mischief,"¹⁷ "criminal recklessness,"¹⁸ and "criminal trespass."¹⁹

Numerous changes were also made throughout the code, either to improve the language or grammar employed in a particular provision,²⁰ or to improve the organization or structure of a provision.²¹ Finally, two provisions in the code were transferred to other parts of the code without having any effect on the substance of the provisions. Robbery was classified as an offense against property in the original 1976 code,²² but it is now classified as an offense against the

¹³See, e.g., Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730 (murder).

¹⁴See, e.g., IND. CODE § 35-42-1-1 (Supp. 1977) (murder).

¹⁵Id. § 35-42-3-3.

¹⁶Id. § 35-42-4-2.

¹⁷Id. § 35-43-1-2.

¹⁸Id. § 35-42-2-2.

¹⁹Id. § 35-43-2-2.

²⁰See *id.* § 35-41-2-1 (voluntary conduct); *id.* § 35-41-4-1 (standard of proof); *id.* § 35-41-5-2 (conspiracy); *id.* § 35-41-5-3 (multiple convictions); *id.* § 35-44-3-8 (obstructing a fireman); *id.* § 35-45-3-2 (littering).

²¹See *id.* § 35-41-3-8 (duress); *id.* § 35-41-4-4 (prosecution barred for different offense); *id.* § 35-44-3-6 (failure to appear); *id.* § 35-46-1-1 (definition of dependent).

²²Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737.

person.²³ Likewise, the definition of sexual intercourse, which was originally included within the section defining rape,²⁴ is now included within the general definitions section at the beginning of the code.²⁵

B. Revised Defenses

Ten specific defenses were grouped together in one chapter of the code as originally enacted in 1976. Although the codification of these defenses was one of the major improvements included in the 1976 code, many of the defenses were substantially revised by the 1977 General Assembly. Of the ten defenses, only four were not changed in some way, including: legal authority,²⁶ intoxication,²⁷ mistake of fact,²⁸ and duress.²⁹ One of the other defenses, the avoidance of greater harm,³⁰ proved to be so controversial that it was finally repealed and eliminated as a defense.³¹ The remaining five defenses were revised to a substantial extent.

1. *Defense of Person or Property.*—In the code as originally enacted, a person was authorized to use "deadly force" in defense of himself or another person,³² or in defense of property other than a dwelling,³³ but he was authorized to use only "force that creates a substantial risk of serious bodily injury" in defense of his dwelling.³⁴ Although the terms may have been essentially the same, the 1977 General Assembly amended the latter provision and substituted the term "deadly force" in order to resolve any question about the type of force authorized.³⁵ The term "deadly force" was then redefined to mean any force "that creates a substantial risk of serious bodily injury."³⁶ Thus, the same degree of force is now clearly authorized for the defense of both person and property, including a person's dwelling.

2. *Use of Force Relating to an Arrest.*—When the code was originally enacted, a provision was included concerning the authority of private citizens and law enforcement officers to use force in making arrests. The section authorized private citizens to use force

²³IND. CODE § 35-42-5-1 (Supp. 1977).

²⁴Pub. L. No. 148, § 2, 1976 Ind. Acts 733.

²⁵IND. CODE § 35-41-1-2 (Supp. 1977).

²⁶*Id.* § 35-41-3-1.

²⁷*Id.* § 35-41-3-5.

²⁸*Id.* § 35-41-3-7.

²⁹*Id.* § 35-41-3-8.

³⁰Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.

³¹Pub. L. No. 340, § 148, 1977 Ind. Acts 1533, 1610.

³²Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 723.

³³*Id.*

³⁴*Id.*

³⁵IND. CODE § 35-41-3-2(b) (Supp. 1977).

³⁶*Id.* § 35-41-1-2.

to make arrests for felonies based simply on probable cause,³⁷ and the 1977 General Assembly amended this to provide that a private citizen may use force to make an arrest only if a felony in fact has been committed and there is probable cause to believe that the other person committed the felony.³⁸ This amendment thus reinstates the previous law concerning arrests for felonies by private citizens.³⁹ The original section also authorized a law enforcement officer to use force "that creates a substantial risk of serious bodily injury" in making an arrest and thereby cast doubt on the authority of an officer to use "deadly force," as discussed above with reference to defense of person and property.⁴⁰ This language was also amended by the 1977 General Assembly, which substituted the term "deadly force" in order to clarify the ambiguity.⁴¹ Finally, the original section also provided that a person could resist an arrest "only if the arrest is clearly unlawful."⁴² This provision was completely eliminated from the revised code, apparently because of the difficulty in determining when an arrest is or is not "clearly unlawful."⁴³

3. *Insanity.*—One of the most controversial provisions in the original 1976 code was the section concerning the defense of insanity. The section simply provided that a person would have a defense if he "lacked culpability as a result of mental disease or defect."⁴⁴ Since this could be interpreted as adopting the *Durham* rule concerning insanity,⁴⁵ the section was amended by the 1977 General Assembly to provide that a person is not responsible "if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."⁴⁶ The section thus now codifies the prior Indiana law concerning insanity as a defense.⁴⁷

4. *Entrapment.*—The defense of entrapment was codified in statutory form for the first time in Indiana in the 1976 version of the code,⁴⁸ and the codification promptly had an effect on the law of the state even though the code was not effective at the time. As

³⁷Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 723-24.

³⁸IND. CODE § 35-41-3-3(a) (Supp. 1977).

³⁹See *Doering v. State*, 49 Ind. 56 (1874); *Teagarden v. Graham*, 31 Ind. 422 (1869).

⁴⁰Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.

⁴¹IND. CODE § 35-41-3-3(b) (Supp. 1977).

⁴²Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.

⁴³See IND. CODE § 35-41-3-3 (Supp. 1977).

⁴⁴Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.

⁴⁵*Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

⁴⁶IND. CODE § 35-41-3-6 (Supp. 1977).

⁴⁷See *Hill v. State*, 252 Ind. 601, 614, 251 N.E.2d 429, 436 (1969).

⁴⁸Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.

enacted, the code made no reference to Indiana's special rule requiring an officer to have some basis for suspecting a person of illegal activity before "baiting" a trap.⁴⁹ After the code was enacted, the Indiana Supreme Court eliminated this special rule and referred to the new code as indicating legislative support for this change in the law.⁵⁰ The supreme court's interpretation was apparently accepted by the 1977 General Assembly, which thereafter made no effort to add the special requirement to this section of the code. The General Assembly did, however, act to limit the defense of entrapment even further by providing that the defense exists only when an offense is produced by a "law enforcement officer, or his agent."⁵¹ This amendment thus narrowed the definition of entrapment since the 1976 code referred to an offense produced by a "public servant."⁵²

5. *Abandonment.*—In the 1976 version of the code, abandonment was recognized as a defense with reference to aiding and abetting, attempt, and conspiracy, but the defense did not apply to conspiracy unless the person also voluntarily prevented the commission of the crime being planned by the conspirators.⁵³ After reviewing all three offenses, the 1977 General Assembly decided to apply the same rules to each and provided that abandonment would be a defense (for each offense) only if the person voluntarily abandoned his efforts and voluntarily prevented the commission of the intended crime.⁵⁴

C. Definitions of Offenses

Numerous changes were made throughout the code with reference to the penalties for various offenses; these will be discussed hereafter in connection with the sentencing provisions. Changes in the definitions of offenses, however, were limited primarily to six offenses, including: attempts, homicide, kidnapping, robbery, burglary, and theft.

1. *Attempts.*—When the Indiana Criminal Law Study Commission submitted its original proposals to the General Assembly, it recommended that there be a general offense of attempt and that a person should be guilty of an attempt if he committed an act or failed to do an act that would constitute "a substantial step toward the

⁴⁹See *Locklayer v. State*, 317 N.E.2d 868 (Ind. Ct. App. 1974). See also Kerr, *Criminal Law and Procedure*, 1975 *Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 186-87 (1975).

⁵⁰*Hardin v. State*, 358 N.E.2d 134, 136 (Ind. 1976).

⁵¹IND. CODE § 35-41-3-9 (Supp. 1977).

⁵²Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 725.

⁵³*Id.* at 726.

⁵⁴IND. CODE § 35-41-3-10 (Supp. 1977).

commission of the crime.”⁵⁵ This recommendation was accepted in part by the 1976 General Assembly, which ultimately provided that a person would be guilty of an attempt after committing a substantial step toward the commission of a crime “and the crime would have been consummated but for the intervention of, or discovery by, another person”⁵⁶ Because this additional language would have severely limited the extent or scope of the offense of attempt, the 1977 General Assembly eliminated the language and reverted to the original recommendation of the Study Commission.⁵⁷ The offense, as finally enacted, thus gives no guidance concerning the definition of a “substantial step” and leaves this to the courts for interpretation.

2. *Homicide.*—(a) *Murder.*—The definition of the offense of murder was almost completely rewritten and restructured in the new and revised code. Under the code as originally enacted in 1976, murder was divided into two classifications. The knowing or intentional killing of another human being and the killing of another human being during the commission or attempted commission of certain felonies were classified as Class A felonies.⁵⁸ In addition, nine specified types of aggravated killings were designated as capital felonies,⁵⁹ and the death penalty was made mandatory for such offenses.⁶⁰ Major changes were made in both of these classifications, primarily because of the new requirements for capital offenses that were established by the United States Supreme Court in a series of cases decided after the 1976 Indiana Code was enacted.⁶¹

Because of the special difficulties involved in defining the offense of murder, the 1977 General Assembly accepted a recommendation to classify murder as a separate offense, *sui generis*.⁶² As a result, the code now includes five felony classifications, including murder and Class A through Class D felonies. In addition, the former offense of capital murder was eliminated and the imposition of the death penalty was made a part of the sentencing process.⁶³ The definition of murder is otherwise essentially the same as that included in the original 1976 code, except that child molesting is now

⁵⁵INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 68 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT].

⁵⁶Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 729.

⁵⁷IND. CODE § 35-41-5-1 (Supp. 1977).

⁵⁸Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730.

⁵⁹*Id.*

⁶⁰*Id.* § 8, at 790.

⁶¹See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 152 (1976).

⁶²IND. CODE § 35-42-1-1 (Supp. 1977).

⁶³*Id.* §§ 35-42-1-1, 35-50-2-3, 35-50-2-9.

included in the list of felonies under the felony-murder provision.⁶⁴ As originally enacted, the felony-murder provisions included the offense of rape but not child molesting. Since the code also redefined rape to exclude statutory rape⁶⁵ and defined child molesting to include statutory rape,⁶⁶ the effect was to eliminate statutory rape from the list of offenses included under the offense of felony-murder. The amendment thus restores statutory rape to the list but also adds other offenses as well since child molesting is defined to include fondling or touching a child and deviate sexual conduct.

Under the code as originally enacted in 1976, murder was punishable as a Class A felony for a determinate period of from twenty to fifty years in prison.⁶⁷ This was changed by the 1977 General Assembly so that murder, as a separate classification, is now punishable by imprisonment for a determinate period of thirty to sixty years.⁶⁸ The standard penalty is to be forty years, with the possibility of twenty years being added for aggravating circumstances or ten years being subtracted for mitigating circumstances. In addition, the state is authorized to seek the death penalty if certain specified aggravating circumstances are shown to exist.⁶⁹ The circumstances must be proved beyond a reasonable doubt at a hearing on the sentence, which is to be held separately from the trial on the issue of guilt or innocence.

By adopting these provisions, the General Assembly has, in effect, required a bifurcated or two-stage trial similar to the one required by the Indiana Supreme Court for habitual offender cases.⁷⁰ The same jury or judge that determines the guilt of the defendant is to decide the issue concerning the existence of the aggravating circumstances. When a jury is involved and decides that an aggravating circumstance in fact exists, the jury is to make a recommendation to the court concerning the death penalty. Regardless of the recommendation, it is advisory only, and the judge is not bound to follow the recommendation. As enacted, the provision thus allows the judge to impose the death penalty even after a jury has recommended otherwise.⁷¹ Furthermore, if the jury cannot agree on a recommendation, the jury is to be discharged, and the judge is authorized to make the decision concerning the sentence. A final

⁶⁴*Id.* § 35-42-1-1.

⁶⁵Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 733.

⁶⁶*Id.* at 734-35.

⁶⁷*Id.* § 8, at 790.

⁶⁸IND. CODE § 35-50-2-3 (Supp. 1977).

⁶⁹*Id.* § 35-50-2-9.

⁷⁰See *Lawrence v. State*, 259 Ind. 306, 286 N.E.2d 830 (1972).

⁷¹IND. CODE § 35-50-2-9(d) (Supp. 1977).

safeguard is added by the specific requirement that the death penalty is to be reviewed by the Indiana Supreme Court under procedures to be adopted by the court.⁷²

The section lists nine aggravating circumstances that may be proved to invoke the death penalty, but there are actually more than nine circumstances since seven offenses are listed under the felony-murder circumstances and four different types of officials are listed under the circumstance concerning the type of victim involved. Seven of the nine listed circumstances are taken from the list of offenses originally designated in the code as capital murder, but the other two circumstances are new provisions added by the General Assembly. The first aggravating circumstance restates the list of offenses included in the felony-murder definition⁷³ and then provides that the death penalty may be imposed if the killing with reference to these offenses was in fact intentional. This is a new provision that was not included in the original code with reference to capital murder.⁷⁴ The other additional aggravating circumstance—the eighth listed circumstance—is certain to be controversial. Under this circumstance, the death penalty may be imposed if the defendant has committed another murder at any time, even if he has not been convicted of the other murder.⁷⁵ This provision would thus cover unrelated murders at any time and at any place, even in another state or jurisdiction, as well as multiple murders committed at one time or in some pattern or scheme. If the defendant has not been convicted of such an offense, the trial court would apparently be required to try the defendant for the offense in the sentencing hearing before a sentence recommendation could be made. Presumably there would be no issue concerning jurisdiction since this would be a sentencing proceeding, but the hearing could well pose double jeopardy issues if the defendant is later brought to trial for the other offense or offenses.

(b) *Manslaughter.*—The definitions of voluntary and involuntary manslaughter were changed almost as drastically as the definition of the offense of murder in the new and revised code. As originally enacted in 1976, the offense of voluntary manslaughter included a number of changes from the previous law and posed several difficult

⁷²*Id.* § 35-50-2-9(h). In *French v. State*, 362 N.E.2d 834, 838 (Ind. 1977), the supreme court stated that it could not review and revise sentences of death until the legislative branch first established standards for applying the death penalty and procedures by which evidence relevant to the standards could be made a part of the court record.

⁷³Compare IND. CODE § 35-50-2-9(b)(1) (Supp. 1977) with *id.* § 35-42-1-1.

⁷⁴See Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 730-31.

⁷⁵IND. CODE § 35-50-2-9(b)(8) (Supp. 1977).

questions of interpretation.⁷⁶ Because of these difficulties, the 1977 General Assembly amended the definition and essentially reenacted the definition of voluntary manslaughter that existed before the code was adopted in 1976.⁷⁷ This appears to have resolved most of the questions concerning this offense except for the question concerning the burden of proof. The General Assembly repealed the provision that the state "is not required to prove intense passion resulting from grave and sudden provocation" but retained the provision that sudden heat is a mitigating factor that would reduce murder to voluntary manslaughter.⁷⁸ By this action, the General Assembly simply left the question open for resolution by the courts. No guidance is given concerning the party that is to prove the mitigating factor of sudden heat. Thus, it may still be logical to conclude that the state must prove the existence of sudden heat as an element of the offense if voluntary manslaughter is charged initially, and that the defendant has the burden at least of going forward with evidence of sudden heat if murder is the basic charge.⁷⁹

The new definition of involuntary manslaughter, however, poses almost as many issues as the definition originally enacted in 1976. The gist of the offense under Indiana law prior to 1976 was the involuntary or unintentional killing of a human being during the commission of an unlawful act.⁸⁰ As enacted in the 1976 code, involuntary manslaughter was divided into two separate offenses. Involuntary manslaughter was defined simply as the killing of a human being while committing an offense.⁸¹ The other offense, reckless homicide, was defined as the reckless killing of another human being.⁸² The new definitions apparently expanded the former offense of involuntary manslaughter to include both intentional and unintentional killings during the commission of any offense, but the definitions still presented two difficult issues. The first issue is whether the related offense is independent of or a lesser included offense of involuntary manslaughter. For example, if a victim is killed during

⁷⁶See Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 14-15.

⁷⁷Compare IND. CODE § 35-42-1-3 (Supp. 1977) with *id.* § 35-13-4-2 (1976) (repealed, effective Oct. 1, 1977). Some provisions of the Indiana Criminal Code in existence prior to 1976 were repealed effective October 1, 1977, by Pub. L. No. 148, §§ 24-28, 1976 Ind. Acts 718, 815-17, and Pub. L. No. 340, § 150, 1977 Ind. Acts 1533, 1611.

⁷⁸IND. CODE § 35-42-1-3(b) (Supp. 1977).

⁷⁹See *Patterson v. New York*, 429 U.S. 813 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). A similar burden of going forward has been placed on the defendant with reference to the defense of insanity, *Young v. State*, 258 Ind. 246, 280 N.E.2d 595 (1972), and self-defense, *Woods v. State*, 319 N.E.2d 688, 693 (Ind. Ct. App. 1974).

⁸⁰IND. CODE § 35-13-4-2 (1976) (repealed, effective Oct. 1, 1977).

⁸¹Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 731.

⁸²*Id.*

the course of a rape, is the rape a lesser included offense of involuntary manslaughter? If so, would the proportionality provision of the Indiana Constitution⁸³ prevent the legislature from prescribing a greater penalty for rape than for involuntary manslaughter?⁸⁴ The second issue is whether the term "offense" includes any and all misdemeanors and felonies or whether it is limited, such as to acts that are dangerous to life or are *mala in se*.

In an effort to resolve both of these issues, the 1977 General Assembly amended the definition of involuntary manslaughter in the new code and inserted a specific list of offenses that could give rise to a charge of involuntary manslaughter.⁸⁵ The first issue was then resolved by limiting the related offenses to Class C felonies or to offenses of a less serious classification. Since involuntary manslaughter is a Class C felony, except when a vehicle is involved, there is thus no issue concerning proportionality even if the related offense is considered to be a lesser included offense of involuntary manslaughter. The other issue was resolved by limiting the offense to those that inherently pose a risk of serious bodily injury, except for the offense of battery, which was the only offense specifically included by name. Although these amendments do appear to resolve the two issues, there does seem to be an inconsistency in the provisions that would subject a person to a prosecution for involuntary manslaughter because of a death resulting from a fist fight, but would otherwise limit involuntary manslaughter to offenses inherently posing a risk of serious bodily injury. In addition, the courts undoubtedly will have difficulty in deciding what offenses are inherently dangerous or pose a risk of serious bodily injury.⁸⁶

3. *Kidnapping and Confinement*.—Despite the controversial nature of the definitions of kidnapping and confinement included in the 1976 code,⁸⁷ the 1977 General Assembly made only one basic change in these provisions. Under the original code, kidnapping was defined only as the removing of a person from one place to another under certain specified aggravating circumstances.⁸⁸ Confinement was defined to include all other forms of removal from one place to

⁸³IND. CONST. art. 1, § 16.

⁸⁴See Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 137, 167-68 (1974).

⁸⁵IND. CODE § 35-42-1-4 (Supp. 1977).

⁸⁶This approach to defining involuntary manslaughter has been criticized because it focuses on the general nature of the offense—whether the offense is generally dangerous—instead of the defendant's conduct—whether the defendant's conduct in the particular situation was dangerous under the circumstances. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 602 (1972).

⁸⁷See Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 18-19.

⁸⁸Pub. L. No. 148, § 2, 1976 Ind. Acts 718, 732-33.

another as well as all forms of unlawful confinement without the person's consent.⁸⁹ The General Assembly decided to define kidnapping to include not only the removal of a person under the specified aggravating circumstances but also the confining of a person under the same circumstances.⁹⁰ Confinement was then left to cover all other forms of both removal and confinement. The kidnapping and confinement provisions concerning removal of a person were also amended to include the use of fraud or enticement in bringing about the removal.⁹¹

4. *Robbery*.—Robbery was defined originally in the 1976 code as the knowing or intentional taking of property from the presence of another person by force or threats of force.⁹² This was not substantially different from the prior definition of robbery, which was the taking "from the person of another any article of value by violence or by putting in fear."⁹³ The words "knowingly or intentionally" were added, the words "from the presence of another person" were substituted for the words "from the person of another," and "putting in fear" was eliminated as an element of the offense.⁹⁴

As revised by the 1977 General Assembly, the final definition resembles the earlier definition even more closely. The General Assembly combined both versions, in part, by including a taking "from another person or from the presence of another person."⁹⁵ Likewise, the legislature reinserted the element of putting a person in fear but expanded the definition of robbery to include a taking by the use of force against "any person" or by "putting any person in fear."⁹⁶ Each of the three possible penalties for robbery was also raised by one classification and the offense of robbery was transferred from the article concerning offenses against property to the article defining offenses against persons, as discussed above.

5. *Burglary*.—The offense of burglary was drastically revised by the 1976 code and was defined simply as the entering of the building of another with an intent to commit a felony therein.⁹⁷ The penalty was to be imprisonment for two to four years, or two to eight years if a deadly weapon was used, and six to twenty years if bodily injury was inflicted.⁹⁸ After reconsidering this offense, the

⁸⁹*Id.*

⁹⁰IND. CODE § 35-42-3-2 (Supp. 1977).

⁹¹*Id.*

⁹²Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737.

⁹³IND. CODE § 35-13-4-6 (1976) (repealed, effective Oct. 1, 1977).

⁹⁴*Id.* § 35-42-5-1 (Supp. 1977).

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 736.

⁹⁸*Id.*

1977 General Assembly restored the element of breaking to the definition, raised each of the penalties by one level of classification, and restored the distinction between dwellings and other buildings by making the penalty higher for entries into dwellings than for entries into other buildings.⁹⁹ As finally enacted, the definition of burglary is not substantially different from the defintion that existed prior to the 1976 code, although the new definition makes no reference to an "other place of human habitation" and omits the special provision that makes a person guilty of burglary if he enters a dwelling with intent to inflict even a minor injury upon a person therein.¹⁰⁰

Although the General Assembly did revert to the earlier definition of burglary, it made another major change in the law by its action, possibly through inadvertence. As originally enacted in 1976, the offense of burglary replaced the offense of entering to commit a felony¹⁰¹ as recommended by the Criminal Law Study Commission.¹⁰² By reinserting the element of "breaking" in the definition of burglary, the legislature eliminated the offense of entering to commit a felony. The offense of criminal trespass was amended to include an entry of a dwelling without consent,¹⁰³ but this is only a misdemeanor and does not fully replace the prior offense of entering to commit a felony.

6. *Theft.*—In 1963, the Indiana General Assembly enacted a new statute entitled the "Offenses Against Property Act,"¹⁰⁴ which was intended to consolidate a number of offenses related to theft. When the Indiana Criminal Law Study Commission submitted its proposals to the General Assembly, it recommended that this statute be simplified even further. Under its version, a person would commit theft "when he knowingly exerts unauthorized control over property of the owner with the intent to deprive the owner of the property."¹⁰⁵ The Commission's proposal also included a series of permissible inferences and definitions related to the offense.

When the code was enacted in 1976, the General Assembly accepted these recommendations in part but altered them substantially by following the former statute's cumbersome style of defining theft.¹⁰⁶ After further review by the Criminal Code Interim Study

⁹⁹IND. CODE § 35-43-2-1 (Supp. 1977).

¹⁰⁰See *id.* § 35-13-4-4 (1976) (repealed, effective Oct. 1, 1977).

¹⁰¹*Id.* § 35-13-4-5 (1976) (repealed, effective Oct. 1, 1977).

¹⁰²PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 94-95.

¹⁰³IND. CODE § 35-43-2-2 (Supp. 1977).

¹⁰⁴*Id.* §§ 35-17-5-1 to -14 (1976) (repealed, effective Oct. 1, 1977).

¹⁰⁵PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 96.

¹⁰⁶Pub. L. No. 148, § 3, 1976 Ind. Acts 718, 737-40.

Commission, the 1977 General Assembly finally agreed to enact the simplified version in the new and revised code.¹⁰⁷ The final version is essentially the same as that originally recommended by the Study Commission although the inferences and definitions have been revised to some extent.

7. *Other Offenses.*—(a) *Perjury.*—Perjury is now defined in the new and revised code as the making of a "false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true."¹⁰⁸ In the 1976 code, the definition was the same except for the additional requirement that the statement be made "before a person authorized by law to administer oath"¹⁰⁹ By eliminating this requirement, the General Assembly apparently extended perjury to cover false statements made under a voluntary oath, including a written statement signed and attested under oath.

(b) *Resisting Arrest.*—As discussed above with reference to the use of force as a defense,¹¹⁰ the original code included a provision that a person could resist an arrest "only if the arrest is clearly unlawful."¹¹¹ This was contrary to the earlier law concerning resisting an arrest,¹¹² and the General Assembly eliminated the section from the new and revised code.¹¹³ The earlier law is now codified in the provision concerning "resisting law enforcement," which provides that a person is guilty of resisting law enforcement if he resists an officer who is "lawfully engaged in the execution of his duties as an officer."¹¹⁴

(c) *Contributing to Delinquency.*—When the 1976 code was enacted, it appeared to make a major change in the law concerning contributing to the delinquency of a minor. The code provided that the offense would be committed when a person eighteen years of age or older "causes" a person under the age of eighteen to commit an act of delinquency.¹¹⁵ Under the law prior to the 1976 code, it was sufficient if the offender "caused" or "encouraged" the minor to commit an act of delinquency.¹¹⁶ This was interpreted to mean that

¹⁰⁷IND. CODE §§ 35-43-4-1 to -5 (Supp. 1977).

¹⁰⁸*Id.* § 35-44-2-1.

¹⁰⁹Pub. L. No. 148, § 4, 1976 Ind. Acts 718, 747.

¹¹⁰See notes 37-43 *supra* and accompanying text.

¹¹¹Pub. L. No. 148, § 1, 1976 Ind. Acts 718, 724.

¹¹²IND. CODE § 35-21-4-1 (1976) (repealed, effective Oct. 1, 1977). Although the word "lawful" was not included in this statute, the Indiana Supreme Court interpreted the statute as authorizing resistance to an unlawful arrest in *Heichelbech v. State*, 258 Ind. 334, 337, 281 N.E.2d 102, 104 (1972). See also *Birtsas v. State*, 156 Ind. App. 587, 591, 297 N.E.2d 864, 867 (1973).

¹¹³See IND. CODE § 35-41-3-3 (Supp. 1977).

¹¹⁴*Id.* § 35-44-3-3.

¹¹⁵Pub. L. No. 148, § 6, 1976 Ind. Acts 718, 758.

¹¹⁶IND. CODE § 35-14-1-1 (1976) (repealed, effective Oct. 1, 1977).

the person who encouraged a minor to commit an unlawful act would be guilty of contributing even though the minor did not thereafter commit the act that was encouraged.¹¹⁷

In view of this apparent change in the definition of delinquency, the 1977 General Assembly amended the provision to include any person who "aids, induces, or causes" a minor to commit an act of delinquency.¹¹⁸ The word "encourage" was not reinserted, however, and the words "aids, induces, or causes" may well be interpreted to require that the juvenile actually commit the unlawful act before contributing to delinquency has occurred. If the words are interpreted in this manner, the encouraging of an act of delinquency may be an offense under the general attempt statute, but it would have to be decided that the encouragement involved a substantial step towards commission of the intended offense.

D. Sentencing

1. *Consecutive Sentences.*—The most significant change in the sentencing provisions, as noted above, was made with reference to consecutive and concurrent sentences.¹¹⁹ Indiana has generally followed a system of imposing concurrent sentences when a person has been convicted of two or more offenses, subject to certain specified exceptions.¹²⁰ As finally enacted, the new and revised code authorizes the trial court to impose concurrent or consecutive sentences in its discretion, except that consecutive sentences are required for offenses committed after a defendant has been arrested and is subject to court action for another offense.¹²¹

2. *Determinate Sentencing.*—One of the major changes included in the 1976 code was the provision for determinate sentencing based on a classification of offenses. This system was continued in the new and revised code with only minor modifications. The penalty provision for Class A felonies was amended to conform to the pattern for the other penalties and now provides for a term of thirty years, which may be increased by twenty years or decreased by ten years.¹²² In addition, the maximum penalty for Class A infractions was increased to ten thousand dollars¹²³ and two additional classes of

¹¹⁷Montgomery v. State, 115 Ind. App. 189, 57 N.E.2d 943 (1944).

¹¹⁸IND. CODE § 35-46-1-8 (Supp. 1977).

¹¹⁹See text accompanying notes 8-10 *supra*.

¹²⁰See Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 32 n.169.

¹²¹IND. CODE § 35-50-1-2 (Supp. 1977).

¹²²*Id.* § 35-50-2-4.

¹²³*Id.* § 35-50-4-2.

infractions were created with maximum penalties of one thousand dollars¹²⁴ and five hundred dollars.¹²⁵

3. *Increased Penalties.*—When the code was originally enacted in 1976, it provided for a reduction in the maximum penalties for a number of offenses. Because of the controversial nature of these reductions, the 1977 General Assembly finally increased the penalties for ten of the offenses in the new and revised code.¹²⁶ In addition, the penalty for murder was increased because of the reclassification of murder from a Class A felony to a separate classification of its own.¹²⁷

4. *Habitual Offenders.*—Under the law as it existed before the 1976 code was enacted, a person who had been convicted of three felonies was subject to imprisonment for life as a habitual offender.¹²⁸ The Criminal Law Study Commission recommended that the prior law be retained but in a somewhat modified form, including a reduction of the term of imprisonment from life to a maximum period of thirty years.¹²⁹ Instead of following the Commission's recommendations, however, the General Assembly initially decided to provide enhanced penalties for any person convicted of a third felony. Enhanced penalty provisions were thus enacted with reference to each felony classification,¹³⁰ and the provisions concerning habitual offenders were omitted from the 1976 code. This approach, however, raised serious procedural questions concerning the imposition of enhanced penalties. In particular, the possibility existed that the two-stage trial required for the trial of habitual offenders¹³¹ would also be required for the trial of a person subject to an enhanced penalty.¹³² These questions were finally resolved by the 1977 General Assembly, which repealed the enhanced penalty provisions and enacted a habitual offender provision, including a provision for a two-stage trial essentially as recommended originally by the Study Commission.¹³³

¹²⁴*Id.* § 35-50-4-3.

¹²⁵*Id.* § 35-50-4-4.

¹²⁶The ten offenses are as follows: kidnapping (aggravated confinement), IND. CODE § 35-42-3-2 (Supp. 1977); rape, *id.* § 35-42-4-1; criminal deviate conduct, *id.* § 35-42-4-2; child molesting, *id.* § 35-42-4-3; robbery, *id.* § 35-42-5-1; arson, *id.* § 35-43-1-1; burglary, *id.* § 35-43-2-1; assisting a criminal, *id.* § 35-44-3-2; professional gambling, *id.* § 35-45-5-3; and dealing in controlled substances, *id.* §§ 35-48-4-2 to -4.

¹²⁷*Id.* § 35-50-2-3.

¹²⁸*Id.* §§ 35-8-8-1 to -2 (1976) (repealed, effective Oct. 1, 1977).

¹²⁹PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at 185-87.

¹³⁰Pub. L. No. 148, § 8, 1976 Ind. Acts 718, 790.

¹³¹Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972).

¹³²See United States v. Tucker, 404 U.S. 443 (1972); Lewis v. State, 337 N.E.2d 516 (Ind. Ct. App. 1975).

¹³³IND. CODE § 35-50-2-8 (Supp. 1977).

E. Additional Provisions

1. *Reenactments.*—When the new code was originally enacted in 1976, many statutes were repealed or eliminated from the state's criminal law. Many of these were eliminated because they were unnecessary, obsolete, or invalid,¹³⁴ but others were repealed inadvertently or for other reasons. As a result, the 1977 General Assembly was asked to reenact a number of these provisions, including the statutes concerning "ghost employees,"¹³⁵ piracy of recordings and films,¹³⁶ theft of trade secrets,¹³⁷ and interference with jury service.¹³⁸

2. *Transfer of Provisions.*—One of the primary objectives of the Indiana Criminal Law Study Commission was to revise and recodify essentially all of Indiana's criminal statutes into one "code" or volume of statutes.¹³⁹ Despite this objective, the Commission itself omitted certain criminal provisions from its proposed code, including the statutes concerning obscenity,¹⁴⁰ and recognized that certain types of offenses such as administrative regulatory offenses and traffic violations should not be included in the criminal code.¹⁴¹ In addition, the General Assembly eliminated certain other provisions from the proposed code, including the provisions concerning abortion¹⁴² and deadly weapons,¹⁴³ and retained the previously existing statutes concerning these offenses.¹⁴⁴ The new and revised Criminal Code, as enacted, is therefore not a complete codification of the state's criminal statutes. This fact may suggest that it is inappropriate even to use the term "Criminal Code" for this collection of criminal statutes. It may be argued that there is only one "Indiana Code," that it includes all of the Indiana statutes arranged by various subjects, and that it would be confusing to refer to each of the individual sub-collections as "codes." Nevertheless, the General Assembly has approved and even mandated the use of the term with reference to certain subjects such as the Election Code,¹⁴⁵ the

¹³⁴See Kerr, *Indiana's Bicentennial Criminal Code*, *supra* note 1, at 36.

¹³⁵Compare IND. CODE § 35-22-8-1 (1976) (repealed, effective Oct. 1, 1977) with *id.* § 35-44-2-4 (Supp. 1977).

¹³⁶Compare IND. CODE § 35-17-7-1 (1976) (repealed, effective Oct. 1, 1977) with *id.* §§ 35-43-4-1(b)(8), 35-43-4-5(c) (Supp. 1977).

¹³⁷Compare IND. CODE § 35-17-3-1 (1976) (repealed, effective Oct. 1, 1977) with *id.* §§ 35-41-1-2, 35-43-4-2 (Supp. 1977).

¹³⁸Compare IND. CODE § 35-1-97-2 (1976) (repealed, effective Oct. 1, 1977) with *id.* § 35-44-3-10 (Supp. 1977).

¹³⁹PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at viii.

¹⁴⁰IND. CODE §§ 35-30-10.1-1, 35-30-10.5-1, 35-30-11.1-1 (1976).

¹⁴¹PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55, at viii.

¹⁴²*Id.* §§ 35-15.1-1-1 to -4.

¹⁴³*Id.* §§ 35-17.1-1-1 to -15.

¹⁴⁴See IND. CODE §§ 35-1-58.5-1 to -8, 35-23-1-1 to -5 (1976).

¹⁴⁵IND. CODE § 3-1-1-1 (1976).

Military Code,¹⁴⁶ the Public Health Code,¹⁴⁷ the Uniform Consumer Credit Code,¹⁴⁸ the Uniform Commercial Code,¹⁴⁹ and the Probate Code.¹⁵⁰

Prior to the recodification of the Indiana statutes in the Indiana Code of 1971, the term "Criminal Code" was used on the spines of the two volumes of Indiana Statutes Annotated,¹⁵¹ which covered criminal law and procedure, and it is probable that the use of the term will continue in the future. Such usage will probably cause some difficulties, however. For example, the term was used for both the substantive and procedural volumes of Indiana Statutes Annotated, as noted above. On the other hand, the Indiana Criminal Law Study Commission recommended eliminating the use of the term completely and suggested using two separate terms instead, "Code of Criminal Procedure"¹⁵² and "Penal Code."¹⁵³ The term "Criminal Code" has been used in this discussion specifically with reference to the codifications of the criminal statutes as enacted by the General Assembly in 1976 and 1977. The term "Penal Code" has not been used because it suggests that there is some clear distinction between substantive and procedural provisions in the criminal law, and yet, the codifications enacted in 1976 and 1977 include some provisions that clearly appear to be procedural as well as others that are at least arguably procedural.

Assuming that the term "Criminal Code" does continue in popular usage, it is necessary to recognize that all of the state's criminal laws are not collected together in one volume or codification but are still scattered throughout the general statutes of the state. A major portion of the statutes are collected in the new and revised code, however, and hopefully the others will be added in the future as the process of codification continues. The 1977 General Assembly moved in this direction by repealing a number of statutes and reenacting them as parts of the Criminal Code as recommended by the Criminal Code Interim Study Commission. These included statutes concerning unlawful use of a police radio,¹⁵⁴ flag desecra-

¹⁴⁶*Id.* § 10-2-1-1.

¹⁴⁷*Id.* § 16-1-1-1.

¹⁴⁸*Id.* § 24-4.5-1-101.

¹⁴⁹*Id.* § 26-1-1-101.

¹⁵⁰*Id.* § 29-1-1-1. The term is also used with reference to the Trust Code, *id.* §§ 30-4-1-1, 2-5-11-1; the Civil Code, *id.* § 2-5-8-1; and the Juvenile Code, *id.* § 2-5-8-4(7).

¹⁵¹IND. STAT. ANN., Vol. 4, Parts 1 & 2 (Burns, 1956 Repl. Vol.).

¹⁵²INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972).

¹⁵³PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 55.

¹⁵⁴Compare IND. CODE § 35-44-3-12 (Supp. 1977) with *id.* § 35-21-1-1 (1976) (repealed, effective Oct. 1, 1977).

tion,¹⁵⁵ unlawful disclosure of telegraph messages or telephone conversations,¹⁵⁶ cruelty to animals,¹⁵⁷ and discrimination in jury selection.¹⁵⁸

At the same time, the General Assembly did not reverse its earlier decision to leave the abortion statutes and deadly weapons statutes out of the new codification. It did, however, enact a statute to resolve a problem that was caused by the decision to retain the previously existing statutes concerning deadly weapons. The Criminal Law Study Commission had originally recommended that the new code contain a general article concerning deadly weapons, including a provision concerning the unlawful possession of a deadly weapon.¹⁵⁹ The 1976 General Assembly declined to enact this general article, thereby retaining the previously existing statutes concerning deadly weapons, but the statute concerning unlawful possession of a deadly weapon was inadvertently repealed.¹⁶⁰ Instead of incorporating this offense into the new and revised code, the 1977 General Assembly amended the statutes concerning deadly weapons and reenacted the offense of unlawful possession as part of those statutes.¹⁶¹

F. Conclusion

After seven years of study, drafting, and legislative debate, Indiana finally has a new and revised criminal code. This new code reflects many changes in form and style, including the reorganization of the state's criminal statutes into a coordinated system, and the elimination of unnecessary, unconstitutional, or obsolete statutes. These changes and revisions were necessary and should have been made previously on a continuing basis, but they will probably have little, if any, impact on the state's criminal justice system. On the other hand, the code does contain a number of other fundamental changes that will undoubtedly have a major impact on the

¹⁵⁵Compare IND. CODE § 35-45-1-4 (Supp. 1977) with *id.* § 35-27-7-1 (1976) (repealed, effective Oct. 1, 1977).

¹⁵⁶Compare IND. CODE § 35-45-2-4 (Supp. 1977) with *id.* § 35-1-108-1 (1976) (repealed, effective Oct. 1, 1977).

¹⁵⁷Compare IND. CODE § 35-46-3-2 (Supp. 1977) with *id.* § 35-1-107-1 to -7 (1976) (repealed, effective Oct. 1, 1977).

¹⁵⁸Compare IND. CODE § 35-46-2-2 (Supp. 1977) with *id.* § 35-15-2-3 (1976) (not repealed).

¹⁵⁹Compare IND. CODE § 35-46-2-2 (Supp. 1977) with *id.* § 35-15-2-3 (1976) (not repealed).

¹⁶⁰PENAL CODE, PROPOSED FINAL DRAFT, *supra* note 55, at 144.

¹⁶¹IND. CODE § 35-1-79-1 to -5 (1976) (repealed by Pub. L. No. 148, § 24, 1976 Ind. Acts 815).

¹⁶²IND. CODE § 35-23-12-1 to -2 (Supp. 1977).

system. These include the classification of offenses according to the seriousness of each offense, the elimination of indeterminate sentences, the elimination of juries from the sentencing process, the adoption of presumptive sentencing, the emphasis on mandatory confinement and the inability to suspend confinement for various offenses and second felony convictions, the authorization of discretionary consecutive sentences, and the provision for an automatic parole for a limited period of time. All of these changes relate primarily to the sentencing process, but the code does contain other changes that are just as important, including: the provision for a general attempt offense, the revised homicide provisions, the new definitions of theft and arson, and the culpability provisions.

Most of the changes in the sentencing process were enacted in 1976 and were not substantially altered by the 1977 amendments; the provision concerning consecutive sentences is the primary exception. The other changes, however, were introduced in the 1976 version of the code but underwent substantial revisions before appearing in their final form in the 1977 amendments. Further revisions may be required from time to time as the code is implemented, but the new and revised code should provide a sound and workable framework for the state's criminal statutes for the foreseeable future.

II. Administrative Law

*Gregory J. Utken**

A. Administrative Rule Making

The federal government has long had a comprehensive system for the promulgation and publication of federal administrative rules and regulations. This system is comprised of the Federal Register and the Code of Federal Regulations. Indiana has now established a parallel promulgation and publication procedure for the state's administrative rules and regulations.¹ Prior to this time, Indiana only had a skeletal procedure for administrative rule making.² Recent legislation elaborated upon this procedure.

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¹IND. CODE §§ 4-22-2-2 to -12 (Supp. 1977) (amending IND. CODE §§ 4-22-2-1 to -11 (1976)).

²*Id.* §§ 4-22-2-1 to -11 (1976) (amended 1977).

Pursuant to Indiana Public Law Number 38,³ an Indiana Administrative Code and Indiana Register have been created. In January of 1978, the Indiana Secretary of State is to deliver a copy of every state administrative rule then in effect to the Indiana Legislative Council.⁴ By January 1, 1979, the Legislative Council is to compile the rules in a numbered system and deliver a copy of the rules to each agency for certification.⁵ After March 1, 1979, the certified rules will become the Indiana Administrative Code.⁶

The Indiana Register, which is to be the counterpart of the Federal Register, is to contain all executive orders, all agency notices concerning proposed new rules, and all of the texts of proposed and approved rules or their amendments.⁷ It will also contain all of the legal notices from the state's agencies as well as their documents that interpret statutes. It will be published at least six times per year. The Indiana Legislative Council will be responsible for preparing and maintaining both the Indiana Administrative Code⁸ and the Indiana Register.⁹

Before any state administrative agency adopts a rule, the agency must publish notice in a newspaper and in the Indiana Register at least twenty-one days prior to a hearing on the proposed rule.¹⁰ On the day of the hearing, any interested party will be afforded the opportunity to participate in formulation of the rule. Once an agency has formulated a new administrative rule, it must first be submitted to the Indiana Attorney General for his approval and then be submitted to the Governor.¹¹

After January 1, 1979, all rules, regulations, and policy documents intended to have the effect of law must conform to this

³Act of Apr. 29, 1977, Pub. L. No. 38, 1977 Ind. Acts 226 (codified at IND. CODE §§ 4-22-2-2 to -12 (Supp. 1977)).

⁴IND. CODE § 4-22-2-2 (Supp. 1977). "Rule" is defined to mean any rule, regulation, standard, classification, procedure, or agency requirement that is intended to have the effect of law. Internal policy rules are not included. *Id.* § 4-22-2-3.

⁵*Id.* § 4-22-2-3.

⁶*Id.*

⁷*Id.* § 4-22-2-12.

⁸*Id.* § 4-22-2-2.

⁹*Id.* § 4-22-2-12.

¹⁰*Id.* § 4-22-2-4. The notice must include the time and place of the hearing and the subject matter of the rule, and must state that a copy of the proposed rule is on file at the appropriate agency's office.

¹¹*Id.* § 4-22-2-5. The Attorney General must approve or disapprove the rule within 45 days of receipt. If he takes no action within that time period, the rule is deemed approved. The rule is submitted to the Governor after the 45-day period; he has 15 days to approve or disapprove it. However, the Governor may request additional time to consider the proposed rule, not to exceed 15 days. If the Governor takes no action within the allotted time periods, the rule is deemed approved.

procedure or they will be void.¹² Once a rule is recorded and published in the Administrative Code, it will be entitled to judicial notice, and the publication will be *prima facie* evidence of the rule's adoption.¹³ The creation of this parallel to the federal administrative rule making process will be a welcome addition to Indiana administrative procedure.

B. Administrative Fact-Finding

The fact-finding responsibilities of an Indiana administrative agency were outlined by the Second District Court of Appeals in *V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc.*¹⁴ In order to permit a court to properly review an administrative determination, the agency must submit sufficient factual findings. In 1972, the Indiana Court of Appeals painstakingly delineated these responsibilities in *Transport Motor Express, Inc. v. Smith*.¹⁵ *V.I.P. Limousine* reaffirmed and elaborated on these guidelines.

In *V.I.P. Limousine*, the court observed that the Public Service Commission (PSC) had not made findings of basic facts in reaching its administrative determination. Furthermore, the court could not presume the existence of the basic facts necessary to support the ultimate conclusions from an agency's findings of ultimate facts.¹⁶ The agency must make specific findings of the basic or underlying facts from which the ultimate findings are inferred.¹⁷ This was the holding in *Transport Motor Express*.¹⁸ However, *V.I.P. Limousine* went on to declare that in some cases, even specified findings of basic facts may not be enough, since an agency's mere recitation of

¹²*Id.*

¹³*Id.* § 4-22-2-11.

¹⁴355 N.E.2d 441 (Ind. Ct. App. 1976).

¹⁵289 N.E.2d 737 (Ind. Ct. App. 1972), *rev'd on other grounds*, 262 Ind. 41, 311 N.E.2d 424 (1974). For discussions of these cases, see Taylor, *Administrative Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 12, 12-13 (1974) and Polden, Stone, Thar, & Vargo, *Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973).

¹⁶355 N.E.2d at 443.

¹⁷In many instances, conclusions that are issues of fact may also be considered issues of law. If a conclusion were considered to be the latter, then arguably the agency would not have to make a specific finding, for as noted in *Transport Motor Express*, the agency's domain is the facts; the court's domain is the law. However, in *V.I.P. Limousine*, the court observed that even if this were true, in order to resolve legal issues, it must resort to facts, and therefore the agency must make findings of fact. 355 N.E.2d at 445.

¹⁸289 N.E.2d at 745-47.

the factors considered and found to be true may not facilitate judicial review any more than would a sole finding of an ultimate fact. As a result, the court required not only findings of basic facts but also a statement of reasons for the agency's determination. According to the court, the statement of reasons should encompass not only a reference to the basic facts but also the relation between the basic and ultimate facts, all within a legal framework that defines the disputed issues.

The ultimate issue to be determined by the PSC in *V.I.P. Limousine* was the "public need" for issuance of a common carrier certificate. The court stated that even if PSC had made findings of basic facts, that alone would have been insufficient for meaningful judicial review. It declared that the agency must also state its reasoning and show why the findings of basic facts support the ultimate finding.¹⁹ Because the PSC had failed to meet this requirement, the court remanded the issue to the Commission for further proceedings.

Transport Motor Express attempted to bring a greater degree of accountability to administrative agencies. *V.I.P. Limousine* indicates that the judiciary's vigor in seeking this goal has not been diminished. Such cases should result in more responsible and responsive administrative bodies in Indiana.

C. Scope of Review

A great deal of confusion can arise over the scope of judicial review of Indiana administrative rulings. The confusion centers upon whether judicial review of an agency's findings of facts is to be "one sided" or "upon the record as a whole." Much of the confusion results from the differing judicial statements regarding the proper scope of review. Indiana courts have stated the proper scope of review to be "substantial evidence,"²⁰ "substantial evidence on the record as a whole,"²¹ "only the evidence and inferences most

¹⁹355 N.E.2d at 445.

²⁰See *Uhlir v. Ritz*, 255 Ind. 342, 264 N.E.2d 312 (1970); *Department of Financial Inst. v. State Bank of Lizton*, 253 Ind. 172, 252 N.E.2d 248 (1969); *City of Evansville v. Nelson*, 245 Ind. 430, 199 N.E.2d 703 (1964); *Mann v. City of Terre Haute*, 240 Ind. 245, 163 N.E.2d 577 (1960); *Public Service Comm'n v. Indianapolis Rys.*, 225 Ind. 30, 72 N.E.2d 434 (1947); *Indiana St. Bd. of Tax Comm'r v. Holthouse Realty Corp.*, 352 N.E.2d 535 (Ind. Ct. App. 1976).

²¹See *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814 (Ind. Ct. App. 1976); *City of Evansville v. Southern Ind. Gas & Elec. Co.*, 339 N.E.2d 562 (Ind. Ct. App. 1975).

favorable" to the prevailing party,²² or "any evidence of probative value."²³

In last year's survey period, the Second District Court of Appeals discussed this issue with some specificity in *City of Evansville v. Southern Indiana Gas & Electric Co.*²⁴ and explicitly declared a rule for scope of review that it felt had been implicit in past Indiana decisions: If an administrative determination is supported by substantial evidence, it will not be disturbed.²⁵ In determining if substantial evidence exists, the court is to look at the entire record. This case was the first explicit recognition of "whole record" review in Indiana.²⁶

In last year's administrative law survey discussion, the author stated it would be interesting to see if Indiana courts followed *City of Evansville*, ignored it, or limited it to its facts.²⁷ Ostensibly, the courts should have followed the decision since *City of Evansville* indicated that its holding had long been the implicit Indiana rule, and the decision was not explicitly limited to reviews of Public Service Commission determinations. However, cases decided prior to *City of Evansville* did not make it clear that "whole record" review was the implicit or explicit test applied. Unfortunately, the cases decided during this survey period have done little to clarify this issue.

In *L. S. Ayres & Co. v. Indianapolis Power & Light Co.*,²⁸ the Second District Court of Appeals quoted verbatim its entire discussion of scope of review from *City of Evansville* without citing the decision.²⁹ Like *City of Evansville*, *L. S. Ayres* involved the Public Service Commission. Thus, the Second District Court of Appeals has followed its pronouncements on "whole record" review expressed last year.

However, the First District Court of Appeals seemed to follow a substantial evidence rule contrary to the one defined in *City of Evansville*. In *Indiana Education Employment Relations Board v.*

²²See *Youngstown Sheet & Tube v. Review Bd.*, 124 Ind. App. 273, 116 N.E.2d 650 (1954); *Kemble v. Aluminum Co. of America*, 120 Ind. App. 72, 90 N.E.2d 134 (1950); *Emmons v. Wilkerson*, 120 Ind. App. 100, 89 N.E.2d 296 (1949); *Hollingsworth Tool Works v. Review Bd.*, 119 Ind. App. 191, 84 N.E.2d 895 (1949); *Walter Bledsoe & Co. v. Baker*, 119 Ind. App. 147, 83 N.E.2d 620 (1949).

²³See *Arthur Winer, Inc. v. Review Bd.*, 120 Ind. App. 638, 95 N.E.2d 214 (1950); *Merkle v. Review Bd.*, 120 Ind. App. 108, 90 N.E.2d 524 (1950); *Nelson v. Review Bd.*, 119 Ind. App. 10, 82 N.E.2d 523 (1948); *Uland v. Little*, 119 Ind. App. 315, 82 N.E.2d 523 (1948).

²⁴339 N.E.2d 562 (Ind. Ct. App. 1976).

²⁵*Id.* at 571.

²⁶"Whole record" review has been the federal standard since the United States Supreme Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

²⁷Shaffer, *Administrative Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 37, 40 (1976).

²⁸351 N.E.2d 814 (Ind. Ct. App. 1976).

²⁹*Id.* at 821-24.

Board of School Trustees,³⁰ the proper scope of review for a decision of the Indiana Education Employment Relations Board (IEERB) was before the court. IEERB found the defendant school corporation guilty of certain unfair labor practices. The school appealed the decision pursuant to the Indiana Administrative Adjudication Act.³¹ In overturning the decision of the IEERB, the trial court reasoned that the evidence, and reasonable inferences to be drawn therefrom, were insufficient to establish the IEERB's case by a preponderance of the evidence.

The court of appeals overturned the trial court's decision because it had applied the wrong scope of review. The court observed that the well established rule on review of administrative decisions was the substantial evidence rule. Without saying more, arguably this could be consistent with *City of Evansville*. However, the court also stated that it was to review the record only to ascertain if there was *any* evidence to support the IEERB's decision. This would indicate application of an "any evidence" or "one sided review," and the reader is left to wonder what scope of review test was in fact applied.

The court of appeals found that the trial court had weighed the evidence to determine in whose favor it preponderated, rather than determining if there was substantial evidence to support the IEERB's decision. It had substituted its judgment for that of the IEERB, which the court found to be impermissible. *Board of School Trustees* is thus an example of what is prohibited by the "weighing of evidence" rule. This well established principle prohibits a court from weighing the evidence submitted by the parties to determine in whose favor it preponderates when reviewing an agency's decision.³² The administrative agency is to weigh the conflicting evidence, draw inferences therefrom, and reach a conclusion on the evidence. The judicial function is said to be exhausted when substantial evidence is found to support the agency's determination.³³

³⁰355 N.E.2d 269 (Ind. Ct. App. 1976).

³¹IND. CODE §§ 4-22-1-1 to -30 (1976).

³²Prior Indiana decisions have likewise refused to allow the lower courts to weigh the evidence. *See, e.g.*, *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974); *Public Service Comm'n v. Chicago, Indianapolis & L. Ry.*, 235 Ind. 394, 134 N.E.2d 53 (1956); *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940); *Aeronautics Comm'n v. Radio Indianapolis, Inc.*, 361 N.E.2d 1221 (Ind. Ct. App. 1977); *Indiana Alcoholic Beverage Comm'n v. McShane*, 354 N.E.2d 259 (Ind. Ct. App. 1976); *Indiana Alcoholic Beverage Comm'n v. Johnson*, 158 Ind. App. 467, 303 N.E.2d 64 (1973); *City of Washington v. Boger*, 132 Ind. App. 192, 176 N.E.2d 484 (1961).

³³*Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478 (1947). The weighing of evidence rule should be distinguished from the substantial evidence rule. The latter rule requires a reviewing court to determine whether an administrative decision is

It is important to note that the proper scope of judicial review for determinations of certain Indiana agencies is specifically affected or governed by statute. When a statute limits the scope of review, courts must observe such limitations. A different scope of review has therefore been applied for review of the decisions of the Industrial Board and Employment Security Review Board.³⁴ The courts have applied a "one-sided" review to those agencies' findings of fact by considering only the evidence and inferences most favorable to those boards' factual decisions. This scope of judicial review for the Employment Security Review Board was reaffirmed during the survey period by the Third District Court of Appeals in *Skirvin v. Review Board of the Indiana Employment Security Division*.³⁵ In that case, the Employment Security Review Board affirmed a decision by an appellate claims referee that a claimant was not entitled to benefits, since he had been discharged from his employment for gross misconduct. The court of appeals affirmed the agency's determination. It cited the general rule for review of Employ-

supported by substantial evidence; in determining the existence of substantial evidence a court is to look at the entire record. Such a rule is said to be necessary, since evidence that might be conclusive if unexplained may lose all probative value when explained or supplemented by other evidence.

However, the distinction between the substantial evidence rule as applied and the weighing of evidence rule may be more apparent than real. If a court reviews the entire record in determining whether an administrative decision is supported by substantial evidence, is it not, just by considering the evidence of both sides, in reality engaging in a process of weighing evidence? Query, at what point in reviewing the record does the court cease a search for substantial evidence and begin weighing the evidence?

³⁴IND. CODE § 22-4-17-12 (1976), which deals with Employment Security Review Board decisions, states in pertinent part: "Any decision of the review board shall be conclusive and binding as to all questions of fact. Either party may . . . appeal the decision to the Appellate Court [Court of Appeals] for errors of law *under the same terms and conditions as govern appeals in ordinary civil actions.*" (Emphasis added.) Similarly, IND. CODE § 22-3-4-8 (1976), which deals with Industrial Board decisions, states in part: "An award by the full board shall be conclusive and binding as to all questions of (the) fact, but either party to the dispute may . . . appeal to the Appellate Court [Court of Appeals] for errors of law *under the same terms and conditions as govern appeals in ordinary civil actions.*" (Emphasis added.)

Another possible argument supporting the different standard of review used in these two agencies' cases is that Industrial Board and Review Board decisions are expressly excluded from the coverage of the Administrative Adjudication Act. IND. CODE § 4-22-1-2 (1976). See *Burnett v. Review Bd.*, 149 Ind. App. 486, 489, 273 N.E.2d 860, 862 (1971). That Act requires agency decisions to be supported by substantial evidence. However, this argument loses any merit it might otherwise have had when one realizes that the Second District enumerated the whole record rule in *City of Evansville*, a PSC case. The PSC is also expressly excluded from coverage of the Administrative Adjudication Act. IND. CODE § 4-22-1-2 (1976).

³⁵355 N.E.2d 425 (Ind. Ct. App. 1976).

ment Security Review Board's decisions: All findings of fact are conclusive and binding on the reviewing court; the court can only consider the evidence and reasonable inferences therefrom that are most favorable to the Review Board's decision.³⁶ On its face, this rule is contrary to the "substantial evidence on the whole record" rule enunciated by the Second District Court of Appeals in *City of Evansville*. However, it should not be viewed as contrary to that decision due to the specific statutory restrictions on the scope of review for Employment Security Review Board decisions, which make the decisions of the Review Board conclusive and binding as to all questions of fact.³⁷ Therefore, reviewing the record as a whole to determine if substantial evidence existed to support the agency's findings of fact would have been beyond the limitation placed upon reviewing courts.

III. Business Associations

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During the survey period five cases were decided that warrant discussion,¹ and there were several significant legislative developments.

³⁶*Id.* at 428.

³⁷IND. CODE § 22-4-17-12 (1976).

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¹There were three other decisions worth a passing reference. The first is *Johnson v. Motors Dispatch, Inc.*, 360 N.E.2d 224 (Ind. Ct. App. 1977), affirming in part and reversing in part summary judgment for two trucking companies in a personal injury suit. The two companies were the owner and lessee of the rig. In turn the lessee's driver was on a "trip lease" from Motors Dispatch when the accident occurred. Under Interstate Commerce Commission rules, 49 C.F.R. § 1057.4(a)(4) (1976), Motors Dispatch was responsible for the driver's torts during the lease. However, a lessor can operate a truck for a lessee, *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 39 (1975), and the lessor can be liable under the doctrine of respondeat superior if it maintains a right to control the driver. *Vance Trucking Co. v. Canal Ins. Co.*, 249 F. Supp. 33 (D. S.C. 1966), *aff'd*, 395 F.2d 391 (4th Cir.), *cert. denied*, 393 U.S. 845 (1968). The issue in *Johnson* was whether the two defendants possessed the right to control the driver's actions. The Court of Appeals held that the owner of the rig unquestionably had no right of control, so summary judgment in his favor was proper, but there was a genuine question of fact as to whether the lessee had surrendered control to Motors Dispatch under the borrowed servant doctrine. Under this doctrine the lending employer escapes liability if there is a transfer of control from the servant to the transferee. See *W. SEAVEY, AGENCY* § 86 (1964); *RESTATEMENT (SECOND) OF AGENCY* § 227 (1958). However, the court might have been contemplating the slightly different

A. Securities Law Fraud

A case that appears deceptively simple, but which has, or more accurately had, some interesting ramifications is *B & T Distributors, Inc. v. Riehle*.² In *Riehle*, the First District Court of Appeals reversed and remanded a decision of the Tippecanoe Circuit Court adverse to individual defendants Kingery and Schilling, and remanded with instructions to enter judgment in favor of their counterclaim and to rescind the purchase of the corporate stock of B & T from the Riehles.³

The action was filed by the Riehles to recover approximately \$13,000 that the defendants had agreed to pay as part of the transaction. Kingery and Schilling counterclaimed, seeking rescission on two theories: (1) common law fraud; or (2) fraud as defined under the Indiana Securities Act,⁴ commonly known as the Blue Sky Act. The

situation where there is dual employment and both masters are liable. See *Gordon v. S.M. Byers Motor Car Co.*, 309 Pa. 453, 164 A. 334 (1932). See generally *RESTATEMENT (SECOND) OF AGENCY* § 226 (1958); *W. SEAVEY, supra* § 85.

The second decision is *Burger Man, Inc. v. Jordan Paper Prods., Inc.*, 352 N.E.2d 821 (Ind. Ct. App. 1976), where the court recognized that corporations can only act through agents and that such agents can be clothed with apparent authority. *Soft Water Utils., Inc. v. Le Fevre*, 308 N.E.2d 395 (Ind. Ct. App. 1974); *Storm v. Marnischke*, 304 N.E.2d 840 (Ind. Ct. App. 1974). The court correctly stated the general rule: The third person must reasonably rely on a manifestation by the principal that the agent has authority. 352 N.E.2d at 832. However, since the manifestation seemed to result from the corporate positions of the agents the court more accurately might have been contemplating the distinct but overlapping concept of inherent authority. Under this concept the agent possesses authority simply by being employed in a position that would normally carry the authority perceived by the third party. See *Farm Bureau Mut. Ins. Co. v. Coffin*, 136 Ind. App. 12, 186 N.E.2d 180 (1962). See generally *RESTATEMENT (SECOND) OF AGENCY* §§ 8A, 161A (1958); *W. SEAVEY, supra* § 59D.

²359 N.E.2d 622 (Ind. Ct. App. 1977).

³The court also awarded interest at 6% from the date of payment for the shares, costs, and reasonable attorneys' fees as provided by the civil penalty section of the Indiana Securities Act in effect when the suit was filed. Indiana Securities Act, ch. 333, § 507, 1961 Ind. Acts 984 (amended 1975). In 1975, the interest rate was increased to 8%. IND. CODE § 23-2-1-19(a) (1976).

⁴IND. CODE §§ 23-2-1 to -21 (1976). The anti-fraud provision of the Act, in pertinent part, makes it "unlawful for any person in connection with the offer, indirectly . . . to make any untrue statements of a material fact necessary or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading . . ." *Id.* § 23-2-1-12 (emphasis added). The civil penalty provision then in effect provided for rescission by purchasers of securities, or damages if the securities had been sold, against a seller who

offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission

trial court rejected both grounds in entering judgment for the Riehles, but the appellate court only discussed the securities law contention. Of course, if a cause of action was properly stated under the Blue Sky Act, it was unnecessary to discuss the other ground.

The appellate court first considered the Riehles' argument that the sale of the B & T shares was exempt from the Blue Sky anti-fraud provision as either an isolated nonissuer transaction⁵ or a small offering.⁶ It correctly rejected this argument because section 23-2-1-2(b)⁷ on its face only exempts certain transactions from the Act's requirement that securities be registered with the Indiana

Indiana Securities Act, ch. 333, § 507, 1961 Ind. Acts 1023 (amended 1975). The 1975 amendments to the Indiana Securities Act also made rescission available to sellers of securities, and § 23-2-1-19(a) now reads as follows:

Any person who offers, purchases or sells a security in violation of any of the provisions of this chapter, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the violation, is liable to any other party to the transaction, who did not knowingly participate in the violation or who did not have, at the time of the transaction, knowledge of the violation, who may sue either at law or in equity to rescind the transaction or to recover the consideration paid, together, in either case, with interest at eight percent (8%) per year from the date of payment, costs, and reasonable attorneys' fees, upon the tender of the security or consideration received by the person bringing the action.

IND. CODE § 23-2-1-19(a) (1976). For discussions of the Indiana Securities Act, see generally Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE 6 (1973); Pasmas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND. L.J. 38 (1963); Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270 (1969).

⁵IND. CODE § 23-2-1-2(b)(1) (1976) exempts "any isolated nonissuer transaction, whether effected through a broker-dealer or not."

⁶The provision in effect at the time of the suit exempted *offers* of securities to no more than 20 persons, provided certain conditions were met. Indiana Securities Act, ch. 333, § 102, 1961 Ind. Acts 984 (amended 1975). The 1975 amendments broadened the scope of this transactional exemption by making it available for *sales* to no more than 35 persons. IND. CODE § 23-2-1-2(b)(10)(i) (1976). See generally Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 59-60 (1975). The § 23-2-1-2(b)(1) and (10) transactional exemptions were the focus of *Hippenstein v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 29-35 (1974).

⁷The current language of the exemption is as follows: "[T]he following transactions are exempted from the registration requirements of Section 3 of this chapter." IND. CODE § 23-2-1-2(b) (1976). The former language, in effect when *Riehle* was filed, exempted the transaction "from section 201." Indiana Securities Act, ch. 190, § 1, 1969 Ind. Acts 541 (amended 1975). Although indirect, the reference was to § 3 of the Act, which makes it "unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted" IND. CODE § 23-2-1-3 (1976). The criminal liability provision of the Act, *id.*, § 23-2-1-18.1, also applies even if the security or transaction is exempt.

Securities Commissioner before they are offered or sold to the public.⁸ Thus, even if a particular transaction is exempt from registration, the anti-fraud proscription still applies. This approach to securities regulation is not unique with Indiana. The Federal Securities Act of 1933⁹ also exempts particular types of securities¹⁰ and transactions¹¹ from the registration requirement of the Act but not the anti-fraud provisions.¹² Limiting exemptions to the registration requirement is also the norm of other state Blue Sky Laws.¹³

The legislative rationale is clear. The registration process¹⁴

⁸Indiana provides two registration procedures: registration by coordination for any security for which a registration statement has been filed under the Securities Act of 1933, 15 U.S.C. §§ 77a - 77aa (1970 & Supp. V 1975), in connection with the same offering, IND. CODE § 23-2-1-4 (1976), and registration by qualification for all other securities, *id.* § 23-2-1-5. *See generally* authorities cited note 4 *supra*. IND. CODE § 23-2-1-2(a) (1976) exempts certain types of securities from the registration requirements.

⁹15 U.S.C. §§ 77a - 77aa (1970 & Supp. V 1975). The registration requirement is imposed by § 5 of the Act. *Id.* § 77e (1970). The commentary on federal securities regulation is legion. The classic reference is L. LOSS, SECURITIES REGULATION (2d ed. 1961 & Supp. 1969), but other selected references can be found in D. RATNER, SECURITIES REGULATION (1975).

¹⁰15 U.S.C. § 77c(a) (1970). The parallel is not complete. Section 3 provides that the provisions of the 1933 Act do not apply to exempted securities "[e]xcept as hereinafter expressly provided." *Id.* The general civil liability and the anti-fraud provisions of the Act expressly apply to any person who uses the instruments of interstate commerce to sell securities. *Id.* §§ 77l, 77q. The provision exempts securities, but certain classes of exempt securities are in reality transactional exemptions if they are securities issued in exchange for other securities, *id.* § 77c(a)(9), (10); securities sold in intrastate offerings, *id.* § 77c(a)(11); and small offerings made pursuant to § 3(b), *id.* § 77c(b). *See generally* D. RATNER, *supra* note 9, at 220. Indiana also treats as a security exemption what might be considered transactional. *See* IND. CODE § 23-2-1-2(a)(8) (1976).

¹¹15 U.S.C. § 77d (1970 & Supp. V 1975). Unlike § 3, § 4 of the 1933 Act specifically provides that the exemption is limited to the registration requirement of § 5. *Id.* § 77e (1970).

¹²*Id.* §§ 77l(2), 77q(a) (1970).

¹³Section 402 of the Uniform Securities Act, 7 UNIFORM LAWS ANNOTATED § 402 (1970), exempts specified securities from § 301 of the Act, the registration provision, but not §§ 101, 409 and 410, which are the anti-fraud, criminal and civil liability provisions respectively. The Uniform Securities Act has been adopted in part or in whole in 32 jurisdictions, and certain provisions of the Indiana Securities Act are based on the Uniform Securities Act. *See generally* 1 L. LOSS, *supra* note 9, at 42 (1961); 1 F. O'NEAL, CLOSE CORPORATIONS § 1.16, at 85 (1971). Blue Sky laws have been prolific generators of legal writing. Professors Jennings and Marsh use almost two full pages to list articles. R. JENNINGS & H. MARSH, SECURITIES REGULATION 1271-72 (4th ed. 1977).

¹⁴One of the basic purposes of all securities regulation is to provide investors with material financial and other information about issuers of securities. SEC v. Ralston Purina Co., 346 U.S. 119 (1953). *See generally* R. JENNINGS & H. MARSH, *supra* note 13, at 53; 1 L. LOSS, *supra* note 9, at 121-28, 178-86 (1961); H. SOWARDS, THE FEDERAL SECURITIES ACT (11 Business Organizations) pt. 1, § 1.02 (1977). To this end, the term

results in formalized disclosure of information about an issuer that is essential to an honest securities market. However, in some situations the expensive process would not add to the protection of investors or benefit the public, that is, a transaction between two purchasers and two sellers, as in *Riehle*. This does not mean such purchasers should be left to the mercies of the seller or to whatever rights they might have at common law. Quite the contrary, it is essential to the scheme of regulation that a buyer of unregistered securities have recourse against a seller¹⁶ who has engaged in any fraudulent practices.¹⁸

Thus, the issue in *Riehle* was whether the sellers had violated section 23-2-1-12. Mr. Riehle had given the plaintiffs an estimated profit and loss statement wherein B & T showed a profit for the first six months of 1971 of approximately \$5,800 and a gross profit margin on sales of approximately 33.4%. For the subsequent equivalent period in 1975, Kingery and Schilling had an actual net loss somewhat over \$100 and a gross profit margin on sales of approximately 26.2% for the equivalent period in 1972. Although Kingery and Schilling had asked to see the corporation's books of account, the Riehles did not comply.¹⁷ These books presumably would have shown that Riehle had grossly overstated the profitability of the business.

The court held that the Riehles' failure to comply with this request was an "omission" of a material fact needed to clarify statements made about the B & T shares and consequently violated the Blue Sky Act. The result would seem appropriate because section 23-2-1-12(2) specifically prohibits such omissions,¹⁸ just as section

"security" is always broadly defined, IND. CODE § 23-2-1-1(k) (1976), 15 U.S.C. § 77b(1) (1970), and liberally construed, SEC v. W.J. Howey Co., 328 U.S. 293 (1946). *But see* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (strict construction).

¹⁶Although fraud by a *purchaser* of securities has always been proscribed, IND. CODE § 23-2-1-12 (1976), rescission by a defrauded seller was not authorized until 1975, *id.* § 23-2-1-19(a).

¹⁷Assuming that the mails or some facilities of interstate commerce were involved, such as a telephone call, Kingery and Schilling could have also brought an action under the Securities Act of 1933 as well. Section 22(a) of the 1933 Act grants state courts concurrent jurisdiction to enforce the Act. 15 U.S.C. § 77v(a) (1970). *See* Wilko v. Swan, 346 U.S. 427 (1953). They could not have sued in an Indiana court for a violation of the Securities Exchange Act of 1934 because § 27 grants exclusive jurisdiction to federal courts. 15 U.S.C. § 78aa (1970). *See* American Distilling Co. v. Brown, 295 N.Y. 36, 64 N.E.2d 347 (1945), *aff'g* 269 App. Div. 763, 54 N.Y.S.2d 855 (1945), *aff'g* 184 Misc. 431, 51 N.Y.S.2d 614 (Sup. Ct. 1944). *See generally* Galanti, *Business Associations*, 1976 Survey of Recent Developments in Indiana Law, 10 IND. L. REV. 57, 67-76 (1976).

¹⁸359 N.E.2d at 623, 625.

¹⁸15 U.S.C. § 77g(a)(2) (1970).

17a(2) of the Federal Securities Act of 1933¹⁹ and rule 10b-5 promulgated under the Securities Exchange Act of 1934.²⁰ However, what the court, and maybe the parties, overlooked is whether there is an obligation on the part of purchasers or sellers of securities seeking rescission under the Indiana Blue Sky Act to act with due diligence in protecting their interests, and, if so, whether Kingery and Schilling exercised sufficient care.

The opinion states that Kingery and Schilling unsuccessfully sought to obtain the books and records of B & T before purchasing the stock but did not insist on seeing them before making a \$70,000 investment. It would not be unreasonable to deny rescission to parties to a securities transaction who act so cavalierly. In other words, perhaps the purchaser of securities should be required to take *some* steps to check out an assertion of fact or at least follow through on an inquiry. After all, this was a face-to-face transaction initiated by Kingery and not a faceless transaction over a stock exchange. This certainly is not a plea for the return of the rule of *caveat emptor*, nor does it ignore that the elements of common law fraud have been liberalized in recent years.²¹ It simply recognizes that a securities buyer might properly be expected to look out for his or her interests rather than relying on rescission if an investment goes sour.

The civil penalty provision authorizing rescission appears neutral on this point in its current form and as in effect at the time of *Riehle*.²² It clearly bars relief where the buyer knows of the omission or has knowledge of the violation, as provided by the 1975 amendments. Construing the statute literally, Kingery and Schilling should have been denied rescission because they obviously knew they had not received the books and records and so were aware of the "omission." The court would then have had to consider the common law fraud claim. However, even if form is ignored in favor of

¹⁹17 C.F.R. § 240.10b-5 (1977). The rule was promulgated pursuant to § 10(b) of the 1934 Act. 15 U.S.C. § 78j(b) (1970). Courts and commentators have at time placed the rule on a pedestal of honor, as in *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 847-48 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), where the court stated the rule was promulgated "to prevent inequitable and unfair practices and to insure fairness in securities transactions generally, whether conducted face-to-face, over the counter or on exchanges . . ." *Id.* at 847-48 (citing 3 L. Loss, *supra* note 9, at 1455-56 (1961)). However, its origins were very modest. See Comments of Milton V. Freeman in the *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967). The judicial attitude has changed since *Texas Gulf*. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 n.8 (1975).

²⁰IND. CODE § 23-2-1-12(2) (1976) is clearly based on federal rule 10b-5, which in turn was based on § 17a(2) of the Federal Securities Act of 1933, 15 U.S.C. § 77g(a)(2) (1970). See Freeman, *supra* note 19.

²¹W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 108, at 715-16 (4th ed. 1971).

²²See discussion in note 4 *supra*.

substance and the "omission" was not of the books of account, but of their contents, it would not strain the statute to say that persons like Kingery and Schilling, who knew that B & T's books might not support the Riehles' claim, but who did not insist on examining them, had constructive knowledge of the omissions. To be sure, there is a countervailing argument: Section 23-2-1-19 provides a due diligence defense for a defendant who can prove he "did not know, and in the exercise of reasonable care could not have known, of the violation,"²³ and if the legislature had intended to impose a due diligence obligation on a plaintiff, it would have so provided.

Under the federal securities laws some courts have obligated plaintiffs in anti-fraud actions to act with diligence. For example, in *Kaplan v. Vornado, Inc.*²⁴ plaintiff was denied relief in a rule 10b-5 action alleging that a convertible debenture should have stated on its face that the issuer could force conversion by calling the security because he had done nothing to learn the basic nature of the security. An even clearer example was *Mitchell v. Texas Gulf Sulphur Co.*,²⁵ denying recovery to a plaintiff who sold Texas Gulf stock almost a week after the company announced its famous Canadian ore strike. Plaintiff claimed reliance on the earlier infamous "gloomy" press release of April 12, 1964, discounting rumors of the strike. In rejecting the claim the court stated:

At some point in time after the publication of a curative statement such as that of April 16, stockholders should no longer be able to claim reliance on the deceptive release, sell, and then sue for damages when the stock value continues to rise. *This is but a requirement that stockholders too act in good faith and with due diligence in purchasing and selling stock.*²⁶

²³In effect this provision makes actionable all intentional and negligent misrepresentations and omissions but not innocent and non-negligent ones. See generally 3 A. BROMBERG, SECURITIES LAW: FRAUD § 8.4(210) (1977). Professor Bromberg doubts that § 410(a)(2) of the Uniform Securities Act, 7 UNIFORM LAWS ANNOTATED § 410(a)(2) (1970), which is similar to § 23-2-1-19(a)(2) of the Indiana Code before the 1975 amendments, ch. 333, § 507, 1961 Ind. Acts 1023, imposes a duty of inquiry on a plaintiff or bars recovery on the basis of constructive rather than actual knowledge. Based upon the similarity of the language to § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1970), and the authority construing that provision, he reasons that constructive knowledge does not bar recovery. His assertion is carefully couched, but then the authority is less than clear. See 3 A. BROMBERG, *supra* §§ 8.4(220), (317).

²⁴[1972-73 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,585 (N.D. Ill. 1971).

²⁵446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971), *rehearing denied*, 404 U.S. 1064 (1972).

²⁶446 F.2d at 103 (emphasis added). In *Financial Indus. Fund, Inc. v. McDonnell-Douglas Corp.*, 474 F.2d 514, 516 (10th Cir. 1973), the court in dictum imposed a duty

The degree of care a plaintiff must exercise would of course vary with the circumstances, such as the nature of the omission and the sophistication of the plaintiff.

Admittedly, as noted in *McLean v. Alexander*,²⁷ the due diligence requirement arose as a defensive response to the ballooning number of private actions brought under rule 10b-5. Now that *Ernst & Ernst v. Hochfelder*²⁸ establishes scienter as an element of a rule 10b-5 suit, *McLean* indicates that the "plaintiff's diligence" defense might not be appropriate if an actual intent to defraud has been established. The Seventh Circuit in *Sundstrand Corp. v. Sun Chemical Corp.*²⁹ agreed with the *McLean* proposition by observing that under a *Hochfelder* standard, only gross conduct somewhat comparable to that of defendant's should cancel out wanton or intentional fraud.

However, as Professor Bloomenthal points out, a plaintiff's care might still be an appropriate inquiry in the "uncharted area of liability between negligence and specific intent to defraud,"³⁰ and the diligence of a plaintiff as a defense is "more likely to arise in the context of nondisclosure and in transactions as to which a court concludes defendant had no duty to make disclosure to the plaintiff, because the information was generally available or because plaintiff had equal access to the information."³¹ Even the most sophisticated investor can be defrauded where there is nondisclosure of material information,³² but it is questionable if Kingery and Schilling were

on a securities purchaser to investigate the stock adequately before purchasing. However, holding the particular plaintiff, a mutual fund, to a higher standard than the ordinary investor is not surprising. *See 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW* § 9.21(6), at 9-109 n.420.2 (rev. 1976).

²⁷420 F. Supp. 1057, 1077-79 (D. Del. 1976). For a general discussion of the due diligence requirement, or the bar of constructive knowledge as it may be called, *see 3 A. BROMBERG, supra* note 23, § 8.4(652); *3A H. BLOOMENTHAL, supra* note 26, § 9.21(6); Wheeler, *Plaintiff's Duty of Due Care Under Rule 10b-5: An Implied Defense to an Implied Remedy*, 70 Nw. L. Rev. 561 (1976); Comment, *Negligent Misrepresentations Under Rule 10b-5*, 32 U. CHI. L. REV. 824, 844 (1965).

²⁸425 U.S. 185 (1976).

²⁹553 F.2d 1033 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3207 (U.S. Oct. 4, 1977) (No. 77-255). *See also* Dupuy v. Dupuy, 551 F.2d 1005 (5th Cir. 1977); Holdsworth v. Strong, 545 F.2d 687, 693 (10th Cir. 1976). Perhaps involvement by a plaintiff that would justify an *in pari delicto* defense might be required. *See Tarasi v. Pittsburgh Nat'l Bank*, [1977] FED. SEC. L. REP. (CCH) ¶ 96,050 (3rd Cir. 1977), *cert. denied*, 98 S. Ct. 505 (1977). Plaintiffs who were active participants in forming the corporation that violated the Indiana Securities Act have been denied rescission. *Theye v. Bates*, 337 N.E.2d 837 (Ind. Ct. App. 1975). *Theye* is discussed in Galanti, *Business Associations, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 57, 76-79 (1976).

³⁰H. BLOOMENTHAL, *SECURITIES LAW IN PERSPECTIVE* 87 (1977).

³¹*Id.*

³²*See Straub v. Vaisman & Co.*, 540 F.2d 591 (3rd Cir. 1976).

true fraud victims where they asked for, but did not insist on, seeing B & T's books. Although the Riehles were less than candid, they did not appear to be guilty of intentional fraud, or at least the trial court so found.

Riehle appears to obligate the seller of corporate shares to furnish the purchaser with the books of account, without request, whenever any representation about an enterprise's profitability has been made. This may or may not be an undue burden, since books of account can well contain material information;³³ but as a matter of policy, a purchaser of securities in a face-to-face transaction should be obligated to follow through on a request to examine books and records before an unprofitable transaction can be rescinded. Of course, the whole problem with *Riehle* might hinge on the trial court's finding that the Riehles had not made false representations of fact and the court's silence as to whether there were omissions of material facts. The court of appeals might have felt there were misrepresentations but did not want to disturb the findings of fact.³⁴

B. Covenants Not to Compete

Another decision of interest is *Peters v. Davidson, Inc.*³⁵ The First District Court of Appeals affirmed an order of the Boone Superior Court enforcing a covenant not to compete and granting Davidson preliminary injunctive relief against its former employee Peters. The disputed covenant was not between Peters and Davidson, as such, but was in an employment agreement between Peters and Avels, Inc., Davidson's predecessor, where Peters was a sales engineer. The particular provision prohibited Peters from divulging or using trade secrets, shop drawings, customer lists or other confidential information of Avels and prohibited him (1) from being connected with or operating a competing business for one year following his employment; and (2) from referring to Avels or its affiliates to their detriment, diverting or attempting to divert business from them, or hiring or attempting to hire any Avels employee for two years following his employment.

Peters worked for Avels until January 1, 1973, when it merged

³³*Neidermeyer v. Neidermeyer*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,123 (D. Ore. 1973). *See generally Holdsworth v. Strong*, 545 F.2d 687 (10th Cir. 1976).

³⁴Indiana Trial Rule 52A provides that a court on appeal shall not set aside a finding of the trial court unless it is clearly erroneous. This has been interpreted to require the reviewing court to hold a firm conviction that a mistake has been made, notwithstanding evidence to support the finding. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (construing FED. R. Civ. P. 52(a)).

³⁵359 N.E.2d 556 (Ind. Ct. App. 1977).

with another company under the Indiana General Corporation Act³⁶ to form Davidson, Inc. He continued with Davidson in the same capacity and in the same territories until he resigned in December, 1975. One week later he formed a corporation to compete with Davidson in the same area.³⁷ Davidson then filed suit alleging the breach of the covenant not to compete, and the trial court granted the application for preliminary injunction phrased in the terms of the covenant.

Although the court considered Peters' contention that the trial court incorrectly determined the question of law involved as the crux of the case, the bulk of the opinion dealt with whether the interlocutory order should be treated as a decision on the merits of the case. Because there was no showing that the hearing for the preliminary injunction was to be treated as a trial on the merits,³⁸ the court did not treat the order as one on the merits and only reviewed the trial court's decision for an abuse of discretion.³⁹

The appellate court started from the premise that covenants not to compete in employment contracts are enforced if they are (1) reasonably necessary for the protection of the employer's business, (2) not unreasonably restrictive of the employee's rights, and (3) not against public policy;⁴⁰ but the court recognized that covenants of

³⁶IND. CODE §§ 23-1-5-1 to -8 (1976). The court referred to the transaction as a merger, but it appears from the facts that it might have been a consolidation where the constituent companies cease to exist and a new consolidated company emerges. See H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 346 (2d ed. 1970). The Indiana General Corporation Act recognizes the distinction between the two procedures, *compare* IND. CODE § 23-1-5-2 (1976) *with id.* § 23-1-5-3, but for purposes of deciding *Peters*, the distinction was irrelevant. For a general discussion of the rights of the surviving corporation in a merger or of the new corporation in a consolidation, see Z. CAVITCH, BUSINESS ORGANIZATIONS §§ 67.01-67.04 (rev. ed. 1977); A. CONARD, CORPORATIONS IN PERSPECTIVE § 119 (1976); 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7040-7041, 7075-7083.1 (perm ed. 1973); H. HENN, *supra* § 346; N. LATTIN, THE LAW OF CORPORATIONS § 170 (2d ed. 1971).

³⁷It was clear that Peters felt he was no longer bound by the covenants. He did not even make an effort to avoid competing with his former employer. 359 N.E.2d at 559.

³⁸The application for the preliminary injunction could have been consolidated with a trial on the merits under Indiana Trial Rule 65(A)(2). *See generally* 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 388 (1971).

³⁹359 N.E.2d at 560 (citing *Rosenburg v. Village Shopping Center, Inc.*, 251 Ind. 1, 238 N.E.2d 642 (1968), and *Angel v. Behnke*, 337 N.E.2d 503 (Ind. Ct. App. 1975)).

⁴⁰*Id.* (citing *Miller v. Frankfort Bottle Gas, Inc.*, 136 Ind. App. 456, 202 N.E.2d 395 (1964), and *Welcome Wagon, Inc. v. Haschert*, 125 Ind. App. 503, 127 N.E.2d 103 (1955)). For a general discussion of the validity of covenants not to compete, *see* 6A A. CORBIN, CORBIN ON CONTRACTS § 1394 (1962); RESTATEMENT (SECOND) OF AGENCY § 396 (1958); RESTATEMENT OF CONTRACTS § 516 (1932); Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960). For a refreshing, albeit lengthy, judicial analysis of this area, *see* *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685 (Ohio Ct. App. 1952).

this nature are strictly construed.⁴¹ It concluded that the trial court did not abuse its discretion within these guidelines. Davidson had pleaded and proved enough to establish the irreparable harm necessary for injunctive relief⁴² by showing Peters' continuing competition.⁴³

On the merits of the case—and the court for all intents and purposes decided the merits—the court rejected Peters' argument that the restrictive covenants lapsed on January 1, 1974, and January 1, 1975, because the merger was the triggering event. According to the court, this point was argued "cogently,"⁴⁴ but not cogently enough. The flaw in the argument was section 23-1-5-5 of the Indiana General Corporation Act. The court cited the entire section, but it clearly was contemplating subsection (d), which provides "all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed,"⁴⁵ and subsection (e) which provides that the single corporation resulting from the merger or consolidation is liable for all the liabilities and obligations of the constituent companies.⁴⁶ Thus, the contractual rights and obligations of Avels became those of Davidson by operation of law on January 1, 1973.⁴⁷

Of course, the parties conceivably could have intended a merger to trigger the covenant, but this would make little sense from the employer's point of view. There is no question but that the court

⁴¹Struever v. Monitor Coach Co., 156 Ind. App. 6, 294 N.E.2d 654 (1973). See generally authorities cited note 40 *supra*.

⁴²The court posited that irreparable harm could be established, even if the damages could not be measured in dollars. 359 N.E.2d at 561 (citing *Welcome Wagon, Inc. v. Haschert*, 125 Ind. App. 503, 127 N.E.2d 103 (1955)).

⁴³Indiana Trial Rule 65(C) provides that the trial court must fix the amount of a security bond before a preliminary injunction can issue. Peters complained about the adequacy of the bond, but this was held to be within the discretion of the trial court. The court stated that if Peters should prevail and show damages exceeding the bond, he could recover the excess from Davidson, 359 N.E.2d at 561-62 (citing *Howard D. Johnson Co. v. Parkside Dev. Corp.*, 348 N.E.2d 656 (Ind. Ct. App. 1976)), but it is not absolutely clear this is true in absence of a showing of malicious prosecution or abuse of process. See *Jones Drilling Corp. v. Rotman*, 245 Ind. 10, 15, 195 N.E.2d 857, 860 (1964).

⁴⁴359 N.E.2d at 562. The dictionary defines "cogent" as something "appealing strongly to the reason or conscience; compelling belief, assent, or action; forcibly convincing as a *cogent* argument or discourse." *FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE* 517 (1974).

⁴⁵IND. CODE § 23-1-5-5(d) (1976). See generally authorities cited note 36 *supra*.

⁴⁶*Id.* § 23-1-5-5(e). See generally authorities cited note 36 *supra*.

⁴⁷The merger agreement apparently provided for the assignment of contract rights to Davidson. 359 N.E.2d at 562.

correctly construed the particular agreement.⁴⁸ The purpose of the covenant, as with all restrictive covenants, was to protect Avels within reasonable limits from competition from a former employee. Certainly if Avels had simply changed its name to Davidson, it would clearly want to continue protection of the covenant and as far as Peters was concerned all the merger did was change Avels' name. His activities did not change after the merger, and he continued to accept the benefits of his employment agreement. Thus, Davidson was entitled to have its interests protected just as was Avels. Peters freely entered into an employment contract containing an apparently enforceable covenant not to compete, and it was proper not to relieve him of his contractual responsibilities simply because Avels was now Davidson.

C. Employment Contracts

A violinist discharged by the Indianapolis Symphony Orchestra for missing two tour concerts was partially successful in his damage action in *Indiana State Symphony Society, Inc. v. Ziedonis*.⁴⁹ In *Ziedonis*, the Second District Court of Appeals affirmed the judgment of the Marion Superior Court that the discharge was in violation of his contract⁵⁰ but reversed and remanded with directions as to recoverable damages.

Ziedonis' contract obligated him to attend concerts, and the Symphony argued that his absences constituted a breach justifying immediate discharge. Ziedonis responded that the discharge for cause provision of the Symphony's Master Agreement did not apply because his individual contract provided a penalty for his absences—a deduction from his weekly salary. He claimed they were justified.⁵¹ The court concluded there was sufficient evidence

⁴⁸The court cited its own decision in *Struever v. Monitor Coach Co.*, 156 Ind. App. 6, 294 N.E.2d 654 (1973), for the proposition that covenants not to compete are strictly construed. 359 N.E.2d at 362. See generally authorities cited note 40 *supra*. However, *Struever* is not completely apposite because it involved a covenant not to compete ancillary to the sale of a business. The *Struever* court struck down the covenant because it did not contain adequate spatial or geographic limitations. This was particularly unfortunate for the corporate plaintiff, which had paid *Struever* for his shares in the business and now was faced with his competition. Perhaps the *Struever* court erred in not holding defendant to his bargain. At least Peters had not been "bought out" by Davidson and was using the money to start a competing business.

⁴⁹359 N.E.2d 253 (Ind. Ct. App. 1976) (White & Buchanan, JJ., concurring).

⁵⁰Ziedonis was discharged twice. The first discharge was to be effective at the end of the subsequent symphony season and the second discharge was effective immediately. He did not complain of the first discharge but only sought damages for what he would have earned until it became effective. *Id.* at 254.

⁵¹The court concluded the Symphony could not use evidence of Ziedonis' conduct before his first discharge in attempting to justify the subsequent discharge for cause. *Id.* at 255.

to sustain the judgment for Ziedonis.⁵²

However, the court also concluded that the damage award was excessive because it did not take into account what Ziedonis had earned while playing with two other orchestras following his discharge. The court divided on which party had the burden of proving whether those earnings actually reduced his losses. Judge White, who wrote the opinion on the breach issue, took the position that the burden of proving mitigation was on the Symphony, and he would not have deducted the earnings because it did not show Ziedonis' earnings actually reduced his loss.⁵³ Judge White recognized that Ziedonis had a duty to use reasonable efforts to avoid loss by securing employment elsewhere but felt that by testifying about his two other jobs Ziedonis did not assume the burden of showing whether his gross earnings exceeded his expenses. He also observed that the Symphony had not objected to a jury instruction recognizing Ziedonis' duty to mitigate damages by making reasonable efforts to obtain work elsewhere but which did not mention that the sums earned should be considered in assessing damages.⁵⁴

Judge Buchanan, with Judge Hoffman concurring, took the position that a discharged employee must mitigate damages and must establish any expenses that would offset the earnings. He recognized that the Symphony had the burden of showing the availability of other employment,⁵⁵ even though the duty to mitigate is on the employee.⁵⁶ Ziedonis in effect satisfied the Symphony's obligation, but he did not establish any offsetting expenses, so the entire amount earned should be treated as mitigation.⁵⁷ Although imposing

⁵²Consequently the denial of the Symphony's motion for a directed verdict under Trial Rule 50(A) was not in error. *See Miller v. Griesel*, 261 Ind. 604, 308 N.E.2d 701 (1974); *Mamula v. Ford Motor Co.*, 150 Ind. App. 179, 275 N.E.2d 849 (1971).

⁵³Both Judge White and Judge Buchanan found support in *Hamilton v. Love*, 152 Ind. 641, 643, 53 N.E. 181, 181 (1899); *Hinchcliffe v. Koontz*, 121 Ind. 422, 426, 23 N.E. 271, 272 (1890); and *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 124, 32 N.E. 802, 807 (1892). They disagreed on the interpretation of *Milhollen v. Adams*, 66 Ind. App. 376, 115 N.E. 803 (1917). Judge Buchanan read it as recognizing that allowances should be made for the employee's expenses but not for imposing the burden of proof on the employer. 359 N.E.2d at 255-56.

⁵⁴Ziedonis was upheld on the calculation of his prospective earnings for the summer and subsequent concert season. 359 N.E.2d at 256.

⁵⁵See note 53 *supra*.

⁵⁶359 N.E.2d at 257 (Buchanan & Hoffman, JJ., concurring). Mitigation limits the recovery by a discharged employee to what his or her actual loss might have been if employment had been sought, as an inducement to find new jobs. *Inland Steel Co. v. Harris*, 49 Ind. App. 157, 163, 95 N.E. 271, 273 (1911).

⁵⁷In essence Judge Buchanan bifurcated the burden of proof on mitigation. The employer has to establish that the employee could find alternative work, and the employee must establish that any amounts so earned did not reduce the damages suf-

this burden on the employee seems somewhat inconsistent with the rule that the employer must show the availability of other employment or a lack of diligence in seeking other employment, it makes eminent sense because the employee and not the employer would know what expenses were incurred in obtaining other work.⁵⁸ Ziedonis was given the option of either a remittance of the entire amount earned or a new trial on the issue of damages, presumably with the burden of establishing any expenses to offset his earnings upon Ziedonis.

D. Respondeat Superior and Independent Contractors

Another interesting decision is *Burkett v. Crulo Trucking Co.*,⁵⁹ reversing a judgment of the Lawrence Circuit Court against Crulo Trucking in a wrongful death action. The primary issue on appeal was whether Crulo was entitled to a separate trial under Indiana Trial Rule 42(b)⁶⁰ because plaintiff, decedent's administrator, had entered into a loan receipt agreement with the estate of the truck driver, a co-defendant. The court recognized the propriety of loan receipt agreements⁶¹ but concluded that the admission of the driver's negligence prejudiced Crulo's right to a fair trial even though the truck driver's estate could recover the amount of the loan exceeding a judgment against Crulo.⁶²

ferred by reason of the breach. 359 N.E.2d at 257 (Buchanan & Hoffman, JJ., concurring).

⁵⁸The suggestion that the employees should have the burden of proof on either the mitigation of damages or the issue of avoidable consequences has not met with much success. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.25, at 925 (1973) (citing C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 159, at 628 (1935)). However, Judge Buchanan suggested that it is more reasonable to shift the burden when offsetting damages. In support of his position, he cited Annot., 22 A.L.R.3d 1047, 1071 (1968), cited in 359 N.E.2d at 257 (Buchanan, J., concurring), but his concurrent citation to MCCORMICK, *supra* §§ 58-60, does not relate to the issue and must be erroneous.

⁵⁹355 N.E.2d 253 (Ind. Ct. App. 1976).

⁶⁰It is appropriate for a court to order a separate trial under this rule in order to avoid prejudice.

⁶¹American Transp. Co. v. Central Ind. Ry., 255 Ind. 319, 264 N.E.2d 64 (1970); Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969). See generally 44 AM. JUR. 2d *Insurance* §§ 1824, 1855 (1969); Thornton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, 43 INS. COUNSEL J. 226 (1976); McKay, *Loan Agreement: A Settlement Device that Deserves Close Scrutiny*, 10 VAL. L. REV. 231 (1976).

⁶²The decision to grant separate trials is within the discretion of the trial court, Holt v. Granite City Steel Co., 22 F.R.D. 65 (E.D. Ill. 1957), but here there was an abuse of discretion because of the damning nature of the co-defendant's admissions. 355 N.E.2d at 260.

What is interesting for purposes of this survey is the court's conclusion that the trial court erred in refusing to give Crulo's tendered instruction on an independent contractor defense. In other words, Crulo claimed the driver was an independent contractor and not an employee, so the doctrine of *respondeat superior*, holding an employer liable for the torts of an employee, would be inapplicable.⁶³ Except for certain exceptions primarily based on policy grounds,⁶⁴ a person is not liable for the torts of an independent contractor who controls the means, methods, and manners of achieving the desired result.

The trial court apparently refused the instruction because plaintiff referred to the truck driver as an agent and not an employee, and the jury could be confused. The appellate court recognized that any problem was not with the instruction but with the semantics of agency law that blur the distinction between the terms "agent," "servant," and "employee" when considering the doctrine of *respondeat superior*.⁶⁵ Unfortunately, courts often fail to recognize that the term "agent" is an umbrella term covering employees and servants, which are basically synonymous, as well as independent contractors. In fact, to an agency purist, an agent is either a servant or a non-servant independent contractor.⁶⁶ Plaintiff viewed "agent" and "independent contractor" as mutually exclusive terms. This was clearly wrong, as the appellate court pointed out. The driver was no doubt Crulo's agent. He may have been a servant or employee, making Crulo liable for the driver's torts under the *respondeat superior* doctrine; or he may have been an independent contractor, in which case the doctrine did not apply.

Crulo had argued and presented evidence that the driver was an independent contractor so it was reversible error to refuse the instruction.⁶⁷ Crulo had the right to an instruction on its defense even

⁶³See *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N.E. 365 (1914); *Hale v. Peabody Coal Co.*, 343 N.E.2d 316 (Ind. Ct. App. 1976); *Stewart v. Huff*, 105 Ind. App. 447, 14 N.E.2d 322 (1938). See generally *RESTATEMENT (SECOND) OF AGENCY* §§ 2(3), 214, 220, 250-251 (1958); *RESTATEMENT (SECOND) OF TORTS* §§ 409-429 (1965); W. SEAVEY, *supra* note 1, §§ 6, 82, 91; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 71 (4th ed. 1971).

⁶⁴For example, a person hiring an independent contractor can be held liable for the latter's torts if the work is intrinsically dangerous. *Denneau v. Indiana & Mich. Elec. Co.*, 150 Ind. App. 615, 277 N.E.2d 8 (1971). See generally authorities cited note 63 *supra*.

⁶⁵See W. SEAVEY, *supra* note 1, §§ 1, 6. The *Burkett* court even observed that Instruction 13.21 of the *Indiana Pattern Jury Instructions* was misleading. 355 N.E.2d at 261.

⁶⁶W. SEAVEY, *supra* note 1, § 6, at 8. To compound matters, Professor Seavey recognizes that there can be independent contractors who are not agents and hence cannot bind the principal on contractual matters. *Id.* §§ 6, 11E.

⁶⁷*Jackman v. Montgomery*, 320 N.E.2d 770 (Ind. Ct. App. 1974).

if plaintiff's case was founded on the erroneous premise that a showing of agency alone brings into play respondeat superior with no additional showing of servant or employee status.

E. Partnership Duties

A decision raising interesting partnership questions is *Pearson v. Hahn*⁶⁸ in which the First District Court of Appeals reversed and remanded a decision of the Morgan Circuit Court against a deceased partner's widow, who sought the appointment of a receiver for two partnerships and an accounting by the surviving partners. The two partnerships involved, Martinsville Leasing Company (MLC) and Martinsville Plaza Company (MPC), were organized to engage in real estate development. The partnership agreements were similar and contemplated the businesses would continue after the partnerships were dissolved. The MPC agreement was a better drafted document because it clearly provided for continuation on the death of a partner and provided two methods for valuing the interests, which the surviving partners could purchase.⁶⁹ The earlier MLC agreement was silent as to dissolution by death and did not provide for valuation of the partnership. It only gave the remaining partners the right to purchase the interest of a former partner.

The MPC continuation agreement obligated the partners wishing to continue the business to notify the former partner or his estate within sixty days after his disassociation from the firm. The problem in *Pearson* was that defendant Hahn was the deceased partner's executor; and even though the notice was given to the attorney for the estate, Hahn and the other surviving partner, McDaniel, in effect notified Hahn in his executory capacity of their intention to purchase the interest. Thus, one issue in the case was whether this notice complied with the provision in the MPC agreement.⁷⁰ The notice was specifically given to the MPC partnership, but it appears the parties and the court considered it applicable to the MLC partnership as well. Because of the similarity in the partnership businesses and agreements, and their close proximity in time, this is not an unreasonable result for reflecting the intentions of the three partners.

⁶⁸352 N.E.2d 767 (Ind. Ct. App. 1976).

⁶⁹The purchase price was to be the lower of the fair market value or the book value of the interest. *Id.* at 768. For a discussion of continuation agreements and the valuation of a deceased partner's interest, see A. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP §§ 83A(c), 86(a), 90A (1968) [hereinafter cited as CRANE & BROMBERG]; M. VOLZ & A. BROMBERG, THE DRAFTING OF PARTNERSHIP AGREEMENTS 26-33, 97-103, 109-19 (6th ed. 1976).

⁷⁰Sometime after the suit was filed, Hahn resigned as executor and was replaced by a bank as administrator d.b.n. 352 N.E.2d at 769.

Defendants had the assets of MPC appraised, as did the widow. Both appraisals were limited to one small parcel of land, transferred to MPC by defendant McDaniel, and showed liabilities exceeding assets. Myers' widow, now Mrs. Pearson, was dissatisfied and sought a financial accounting of both partnerships. The suit seeking the appointment of a receiver and an accounting pursuant to the Indiana Accounting by Surviving Partners Act⁷¹ followed Hahn's failure to respond to Mrs. Pearson's request.

The trial court found that the title to all real estate, except for the one parcel, was held in the names of the partners and their wives as individuals. Accordingly, any interest Pearson had in those properties was as a surviving tenant by the entirety and not as an heir. Since the tract in MPC's name had a negative value, the trial court ordered the conveying of Myers' interest in MPC to the surviving partners without consideration. The trial judge obviously accepted the propriety of the notice.

The appellate court treated the case as having two issues: (1) whether it was proper for Hahn to give notice to himself; and (2) whether the notice made inapplicable the provisions of the Indiana Accounting by Surviving Partners Act and, although the court was not clear, the Indiana Uniform Partnership Act⁷² pertaining to the dissolution of a partnership. The court said it would discuss the issues concurrently but seems to have ignored the second. However, it did reach a result congruent to the Indiana Uniform Partnership Act when it held that the inherent conflict of interest between Hahn as a surviving partner and Pearson as the beneficiary of the deceased partner's estate obligated him to fully disclose to her, upon request, all assets arguably belonging to the partnerships.⁷³

Interestingly, the court based its decision on common law and ignored the Indiana Uniform Partnership Act. It relied primarily on cases discussed in an A.L.R. annotation and *Moorman v. Moorman*.⁷⁴ These cases establish that a surviving partner dealing with a deceased partner's estate has an affirmative obligation to fully inform the estate of the assets of the partnership.⁷⁵ As the Indiana Supreme Court recognized in *Moorman*, the heirs of a deceased partner are at a disadvantage in dealing with a surviving partner concerning the partnership.⁷⁶ Normally, disclosure would be to the

⁷¹IND. CODE §§ 23-4-3-1 to -8 (1976).

⁷²*Id.* §§ 23-4-1-1 to -43.

⁷³352 N.E.2d at 773-74.

⁷⁴*Id.* at 772-73 (citing Annot., 45 A.L.R.2d 1009 (1956), and *Moorman v. Moorman*, 226 Ind. 192, 79 N.E.2d 112 (1948)).

⁷⁵See, e.g., *Tenant v. Dunlop*, 97 Va. 234, 33 S.E. 620 (1899), cited in *Pearson v. Hahn*, 352 N.E.2d at 772.

⁷⁶226 Ind. at 196, 79 N.E.2d at 114. *Moorman*, decided before the Uniform Partnership Act was adopted, held that the appointment of a receiver under the Indiana

representative of the estate; but where, as here, a partner represents the estate, the disclosure has to be to the beneficiaries themselves.

The obligation to disclose upon demand has been codified in the Indiana Uniform Partnership Act. Section 20 compels partners to render on demand "true and full information of all things affecting the partnership to . . . the legal representative of any deceased partner."⁷⁷ Section 22 gives a partner the right to an accounting as to partnership affairs,⁷⁸ and this right accrues to the legal representative under section 43 when dissolution is caused by death.⁷⁹ Section 42 of the Act gives the estate of a deceased partner certain rights where the business is continued, subject to any continuation agreement.⁸⁰ The *Pearson* court did recognize that partners can make binding agreements to allow surviving partners to buy out a deceased partner's interests and stated that partners can serve as executors or administrators, even if Hahn's conduct here was improper.

Unfortunately, the court failed to give any guidance to the trial court as to what constitutes partnership property when it remanded the case for a complete audit of the assets of the two partnerships. The trial judge apparently thought that the legal title held by the partners and their wives was controlling and that the various business properties involved, except for the one parcel, were not partnership property. What is not clear is whether he considered the possibility that the properties were thought to be partnership property by the partners, even though title was in their names as individuals as a carry-over from the common law rule that a partnership was not an entity capable of holding title.⁸¹ They might have followed the traditional partnership practice, even though section 8 of the Indiana Uniform Partnership Act⁸² changes the common law.

Accounting by Surviving Partners Act was within the discretion of the trial court. *Id.* at 195-96, 79 N.E.2d at 114.

⁷⁷IND. CODE § 23-4-1-20 (1976).

⁷⁸*Id.* § 23-4-1-22.

⁷⁹*Id.* § 23-4-1-43. This right exists subject to any agreement to the contrary. For a discussion of the right to an accounting under the Uniform Partnership Act, see CRANE & BROMBERG, *supra* note 69, § 72.

⁸⁰IND. CODE § 23-4-1-42 (1976). See generally CRANE & BROMBERG, *supra* note 69, §§ 86, 90A.

⁸¹See, e.g., *Adams v. Blumenshine*, 27 N.M. 643, 204 P. 66 (1922). See generally Powell, *Land Capacity of Natural Persons as Unincorporated Groups*, 49 COLUM. L. REV. 297, 314-15 (1949).

⁸²IND. CODE § 23-4-1-8 (1976). The Uniform Partnership Act did not entirely reject the aggregate theory of partnerships, CRANE & BROMBERG, *supra* note 69, § 3, but it clearly adopted the entity theory with respect to real property in § 8(3). CRANE & BROMBERG, *supra* note 69, § 38.

In effect, the statute recognizes the partnership as an entity apart from the partners for holding title. The question of whether the real estate was partnership property or the individual property of the partners is one of intent.⁸³ The fact that title was in the individual names does not preclude a finding that it is partnership property and vice versa,⁸⁴ although the interest of the partnership is equitable and the creditors of the legal titleholders would have priority.⁸⁵

The appellate court could not be expected to determine the partners' intent, but the trial court should have been advised to consider the possibility that more than the small tract was partnership property. The evidence, at least as it appears in the opinion, is not conclusive. For example, McDaniel bought the property before the partnership was formed and kept the balance after conveying the small tract. This would be evidence that the property was McDaniel's individual property, based on section 8 of the Indiana Uniform Partnership Act. Title to the real estate managed by MLC was in their individual names, the financing was obtained in their names, and they signed leases as lessors. This would tend to support the conclusion that MLC did not have any property. However, lending sources might have insisted on their borrowing as individuals, even though partners are personally liable for partnership debts.⁸⁶ However, they did form partnerships pursuant to written agreements and so contemplated conducting business as partners. It would not be illogical for them to consider the property as partnership property regardless of who held title.

In fact, it is not clear what the appellate court expected of the trial court. If it merely wanted the disclosure of partnership property, or arguably partnership property, it was compelling an exercise in futility. All information is now known. Perhaps it was direc-

⁸³See *Roberts v. McCarty*, 9 Ind. 16 (1857). See generally CRANE & BROMBERG, *supra* note 69, § 38.

⁸⁴However, courts are less inclined to find property held in the name of the partnership to be individual property because it presumably has been used in the firm's business, CRANE & BROMBERG, *supra* note 69, § 37, but mere use in the business might not be enough to support a finding that it was to be partnership property. See *Ellis v. Mihelis*, 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963).

⁸⁵See *Roy E. Hays & Co. v. Pierson*, 32 Wyo. 416, 234 P. 494 (1925). See generally CRANE & BROMBERG, *supra* note 69, §§ 37(d), 38.

⁸⁶Conceivably the lenders desired to be personal as well as partnership creditors in order to enjoy a higher priority in the event of the bankruptcy of the firm and the partners. See *Rodgers v. Meranda*, 7 Ohio St. 180 (1857); IND. CODE § 23-4-1-40 (1976). See generally CRANE & BROMBERG, *supra* note 69, §§ 90, 91-94. It is interesting to note that the Annotation relied on by the *Pearson* court on the first issue discussed situations where property owned by the individuals before the partnership was formed became an asset of the partnership. Annot., 45 A.L.R.2d 1009 (1956).

ting the trial court to treat the balance of the tract from which the parcel was conveyed as MPC property. This puts the trial court in a dilemma. It might very well have considered the issue and simply rejected the assertion that the property belonged to the partnership.

F. Statutory Developments

Although the 1977 session of the Indiana General Assembly produced several noteworthy statutory developments,⁸⁷ probably the most significant development occurred in *Great Western United Corp. v. Kidwell*,⁸⁸ where a federal district court declared the Idaho Corporate Takeover Act⁸⁹ unconstitutional. The ruling, if upheld on appeal, could affect all state laws regulating corporate tender offers, including the Indiana Business Takeover Act passed in 1975.⁹⁰

The rationale of *Great Western* was twofold. The first ground was that the Idaho statute conflicted with and frustrated the clear purpose of the Williams Act amendments to the Securities Exchange Act of 1934,⁹¹ requiring certain disclosures of companies making tender offers. The Williams Act was intended to protect shareholders of target companies without unduly impeding cash takeover bids, and the court concluded the Idaho statute destroyed the careful balance between the interests of the offeror and those of the management of the target company. Judge Hill emphasized that the Idaho statute primarily benefited managements of target companies by permitting lengthy hearing procedures for tender offers opposed

⁸⁷Other enactments worth noting are IND. CODE § 23-1-10-2 (1976), relating to the corporate director's liability, amended to conform more closely to the language of 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 48 (2d ed. 1971); IND. CODE §§ 23-1-11-4, -8, -9 (Supp. 1977), amended to permit filing of certified copies of corporate documents by foreign corporations qualified to do business in Indiana; *id.* §§ 6-2-1-30, 22-4-32-22, amended to require that notice of a pending corporate dissolution need only be given to the Indiana Department of Revenue and the Employment Security Division when incorporators are dissolving a corporation that has not commenced business; *id.* § 23-3-2-2, amended to afford the surviving corporation in a merger a fee credit, based on the fees the nonsurviving corporation had paid on its authorized shares; and *id.* § 23-2-1-1(k), amended to exclude from the definition of "security" certain contracts or trusts that comply with specified provisions of the Federal Internal Revenue Code.

⁸⁸[1977] FED. SEC. L. REP. (CCH) ¶ 96,187 (N.D. Tex. 1977).

⁸⁹5A IDAHO CODE §§ 13-1501 to -1513 (Supp. 1977).

⁹⁰IND. CODE §§ 23-2-3-1 to -12 (1976). For a discussion of this Act, see Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 52-59 (1975); Note, *The Indiana Business Takeover Act*, 51 IND. L.J. 1051 (1976). For a discussion of tender offers in general, see authorities cited in Galanti, *supra*, at 53 nn.92 & 94, and Note, *supra*, at 1053 n.5.

⁹¹15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970).

by management.⁹² These statutes definitely can be detrimental to shareholders by discouraging tender offers or by reducing the tender price.⁹³ Although federal law has not and cannot totally occupy the field of securities regulation,⁹⁴ federal law had to prevail here because the purposes were in opposition. The court also held the statute unconstitutional under the Commerce Clause.⁹⁵ The statute had a substantial effect on interstate commerce and did not accomplish a legitimate "local purpose." Certainly compliance with many potentially conflicting state statutes would have such an effect, even if compliance with one did not.

It is, of course, too early to tell if Judge Hill's ruling will be upheld on appeal, but it is significant that the Supreme Court emphasized the "balance" of the Williams Act in *Piper v. Chris-Craft Industries, Inc.*⁹⁶ Certainly little support for the state acts can be expected from the SEC because its attitude towards business takeover statutes is hostile.⁹⁷ Without doubt, *Great Western* adds a new dimension to the already mind-boggling tender offer game.

The most significant actual legislative development was the adoption of section 35 of the Model Business Corporation Act,⁹⁸ which defines the duties and standards of care of corporate directors. Section 23-1-2-11(a) formerly provided, in part, that "the business of every corporation shall be managed by a board of directors." This is the so-called "corporate norm" where directors of a corporation are expected to manage its affairs. It is also the concept

⁹²The Indiana Act is similar. IND. CODE § 23-2-3-1(i)(5) (1976) excludes tender offers that have been approved by the board of directors of the target company from the definition of offers subject to the Indiana Securities Act.

⁹³In the tender offer involved in *Great Western*, the company reduced its bid for Sunshine Mining by \$1 because of management's opposition. See BUS. WEEK, Oct. 3, 1977, at 40. The bid was eventually raised when Great Western and Sunshine Mining reached an accord. Wall St. J., Oct. 6, 1977, at 16, col. 3. Opposition by management backfired even more when the Gerber Products Co. was sued for \$100 million after its opposition caused an offeror to reduce its bid by \$3. The bid was ultimately dropped. BUS. WEEK, Aug. 29, 1977, at 25; *id.*, Oct. 3, 1977, at 50.

⁹⁴Section 18 of the 1933 Act, 15 U.S.C. § 77r (1970), and § 28 of the 1934 Act, 15 U.S.C. § 78bb(a) (1970), specifically allow for state regulation of securities. SEC v. National Sec. Inc., 393 U.S. 453, 461 (1969). The terms of § 28 permit state regulation only to the extent it does not conflict with the federal regulatory scheme. 15 U.S.C. § 78bb(a) (1970).

⁹⁵U.S. CONST. art. I, § 8, cl. 3.

⁹⁶97 S. Ct. 926 (1977).

⁹⁷Wall St. J., Aug. 3, 1977, at 1, col. 1. When the SEC recently amended schedule 14D-1, 2 FED. SEC. L. REP. ¶ 24,284C (1977) (to be codified in 17 C.F.R. § 240.14d-100), and rule 14d-1, 2 FED. SEC. L. REP. ¶ 24,281A (1977) (to be codified in 17 C.F.R. § 240.14d-1), it emphasized that efforts to benefit shareholders in the context of tender offers should not unnecessarily tip the balance in favor of either side.

⁹⁸1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 35 (2d ed. 1971).

that has plagued the principals of closely held corporations who wished to operate an enterprise more as a chartered partnership than as a publicly held corporation like General Motors.⁹⁹ Unfortunately, other jurisdictions have construed the model act's statutory charge to restrict the rights of owners of a corporation to agree among themselves as to how they will vote and otherwise manage its affairs.¹⁰⁰ However, some recent cases recognize the *sui generis* nature of close corporations and have allowed more flexibility in their structuring.¹⁰¹

Section 23-1-2-11(a) now reads in pertinent part: "[C]orporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in this article or the *articles of incorporation*."¹⁰² Thus, the legislature has sanctioned arrangements for managing close corporations, provided they are contained in the articles of incorporation. In fact, shareholders can eliminate the board of directors and manage the corporation's affairs directly.¹⁰³ It would seem, then, that Indiana has "modernized" its General Corporation Act. By eliminating the old inflexible "norm," it now reflects a common practice for closely held corporations "in the real world."¹⁰⁴

However, it is also possible to characterize the new provision as evidence that Indiana has joined what Justice Brandeis characterized in his dissent in *Liggett v. Lee*¹⁰⁵ as a "race of the lax." The

⁹⁹For an interesting discourse on the typology of corporations, see A. CONARD, *supra* note 36, at 152-74.

¹⁰⁰See, e.g., *Clark v. Dodge*, 269 N.Y. 410, 199 N.E. 641 (1936); *McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E. 234 (1934). See generally *Delaney, The Corporate Director: Can His Hands Be Tied in Advance*, 50 COLUM. L. REV. 52 (1950).

¹⁰¹See, e.g., *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1965); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975). But see *Somers v. AAA Temporary Serv., Inc.*, 5 Ill. App. 3d 931, 934, 284 N.E.2d 462, 465 (1972), which construed *Galler* as permitting slight deviations from corporate norms, but forbidding shareholder agreements that are in direct contravention of the statute.

¹⁰²IND. CODE § 23-1-2-11(a) (Supp. 1977) (emphasis added). Attempting to accomplish the goal of flexibility by means of bylaws, unless specifically authorized by the Indiana General Corporation Act, appears risky, because the Act specifies that such matters must be accomplished in the articles of incorporation. See *In re William Faehndrich, Inc.*, 2 N.Y.2d 468, 141 N.E.2d 597 (1957).

¹⁰³IND. CODE § 23-1-2-11(a)(1) provides that persons acting in lieu of a board of directors shall have the powers and duties of directors. See generally 1 ABA-ALI MODEL BUS. CORP. ACT. ANN. § 35, ¶ 2, at 755-59 (2d ed. 1971).

¹⁰⁴One potential problem with a custom-tailored flexible corporation is that it increases the risk that a court might disregard the corporate fiction and impose personal liability on the shareholders.

¹⁰⁵288 U.S. 517, 541-79 (1933). If the legislature had been interested only in aiding Indiana close corporations, it could have adopted the language of § 35 as liberalized in 1969, 1 ABA-ALI MODEL BUS. CORP. ACT. ANN. § 35, at 755 (2d ed. 1971).

reference here is to section 23-1-2-11(a)(2), which affirmatively states that the duty of care of a director is to serve "in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances."

According to the comments on the most recent amendments to section 35 of the Model Business Corporation Act, this standard "reflects the good faith concept embodied in the so-called 'business judgment rule.'"¹⁰⁶ These comments recognize that the traditional corporate norm could require outside directors who are not otherwise actively involved with the corporation to become involved in the detailed administration of its affairs. The comments observe that this expectation can "no longer be viewed to be reasonable. Indeed, such involvement is clearly neither practical nor feasible insofar as today's complex corporation, other than perhaps the closely-held corporation, is concerned."¹⁰⁷ To the contrary, when reports of corporate misdeeds are still making news, it is inappropriate for the legislature to lower the duty of outside directors who might be the only people able to police management.

The amendment has broadened the right to rely on reports and documents furnished by corporate personnel, professionals, or other committees of the board of directors.¹⁰⁸ If a director reasonably believes in the reliability and competence of the persons giving such reports, there is no liability for being or having been a director. The provision does state that a director "shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause such reliance to be unwarranted,"¹⁰⁹ but this could well be an invitation for directors *not* to examine operations in case some questionable conduct might be disclosed.

In an article on director reliance on counsel, the model act's authors favorably note that the revision of section 35

constitutes the most comprehensive definition of a director's right of reliance yet attempted. In sweeping language it now makes the right of reliance available not only for legal questions but also for factual information covering virtually

¹⁰⁶See the report that proposed the current language of § 35. Committee on Corporate Laws, *Changes in the Model Business Corporation Act*, 29 BUS. LAW. 947, 951 (1974).

¹⁰⁷*Id.* at 952.

¹⁰⁸Ch. 275, § 41, 1967 Ind. Acts 866, 867-68 (formerly codified at IND. CODE § 23-1-10-2(e) (1976)), allowed reliance on financial statements as a defense to three described violations involving pay outs of corporate funds. This provision was deleted in the current version of IND. CODE § 23-1-10-2 (1976) and superseded by the far broader language of *id.* § 23-1-2-11(a) (Supp. 1977).

¹⁰⁹IND. CODE § 23-1-2-11(a)(2) (Supp. 1977).

every aspect of corporate activity for which the board of directors may be responsible.¹¹⁰

They recognize the trend in the revision of corporation codes towards a general "enabling" philosophy, but argue:

Nonetheless, granting management the right to rely on counsel and others does not reduce management's traditional accountability. The general requirements of good faith and due care inherent in the statutory provisions are sufficient assurance of this. Instead, the salutary development merely recognizes the facts of life in the operation of a complex corporate enterprise.¹¹¹

This is possibly true, but a court might not diligently scrutinize the conduct of a director when faced with statutory language as broad as that of section 23-1-2-11(a)(2). This does not mean shareholders' interests will be ignored, but they may be given short shrift.¹¹² Considering the recent trend of the Supreme Court in interpreting the federal securities laws,¹¹³ shareholders of publicly held corporations have precious little protection. Perhaps that is why the individual investor has left the market.

A second significant change to the General Corporation Act was the adoption of new section 23-3-4-1.6 governing reinstatement of corporations whose terms of existence have expired or whose articles have been revoked for failing to file annual reports.¹¹⁴ The statute, which applies to not-for-profit corporations as well, now provides for the reinstatement of such corporations upon application to the Secretary of State and the satisfaction of certain specified requirements. The amendment provides that the "corporation shall be

¹¹⁰Hawes & Sherrard, *Model Act Section 95 — New Vigor for the Defense of Reliance on Counsel*, 32 BUS. LAW. 119, 119 (1976). See also *Report of the Committee on Corporate Law Departments On Corporate Director's Guidebook*, 32 BUS. LAW. 1841 (1977).

¹¹¹Hawes & Sherrard, *supra* note 110, at 145-46.

¹¹²As Hawes & Sherrard point out, proof of reliance on counsel should be permitted where good faith is an element of a director's duty of loyalty or where the duty is measured under the business judgment rule. Hawes & Sherrard, *supra* note 110, at 136.

¹¹³See, e.g., *Santa Fe Indus., Inc. v. Green*, 97 S. Ct. 1292 (1977); *Piper v. Chris-Craft Indus., Inc.*, 97 S. Ct. 926 (1977); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *United Hous. Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

¹¹⁴IND. CODE § 23-3-4-1.6 (Supp. 1977). This section replaced IND. CODE § 23-3-4-1.5 (1976).

deemed to have continuously existed since the date¹¹⁵ of its termination or revocation, thus eliminating any questions about the validity of corporate acts during the hiatus. A conforming amendment was made to section 23-1-7-4 to eliminate the prior procedure of reinstating a corporation whose existence has terminated pursuant to its articles by amending its articles to extend its duration.

There is no quarrel with a procedure streamlining the process of reinstating corporations that have failed to file annual reports, since it is a common occurrence. The only question that this author has is that the Act does not indicate the duration of the reinstated corporation. There is no problem for a corporation with a perpetual duration whose articles were revoked, but there is for a corporation whose existence was limited to, for example, five years. Is its duration perpetual? The statute is silent and should be clarified. However, a strong argument can be made that by deleting the language in section 23-1-7-4 concerning amending the articles, the legislature has demonstrated an intent that the newly reinstated corporation would have perpetual duration. Those responsible for reinstating such a corporation could, of course, amend the articles pursuant to the regular amendment process¹¹⁶ if they wished to limit its duration.

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

1. Quasi in Rem Jurisdiction.—A fitting introduction to this section is the penetrating opinion of the United States Supreme

¹¹⁵IND. CODE § 23-3-4-1.6(c) (Supp. 1977). The courts are divided as to whether a corporation with a revoked charter had de facto status during the period of revocation. *Compare* Spector v. Hart, 139 So. 2d 923 (Fla. Ct. App. 1962) *with* Moore v. Rommel, 233 Ark. 989, 350 S.W.2d 190 (1961). A statutory provision granting de facto status has been declared unconstitutional. *See* Gano v. Filter-Aid Co., 414 S.W.2d 480 (Tex. Ct. App. 1967). An interesting question is whether the new provision would make the penalty provision of IND. CODE § 23-1-10-5(a) (1976) inapplicable where the business was conducted "knowingly and willfully and with intent to defraud" during the period the articles were revoked.

¹¹⁶IND. CODE § 23-1-4-1 (1976).

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Court in the case of *Shaffer v. Heitner*.¹ While a detailed analysis is beyond the scope of this article, it appears that the holding was aimed at extending the minimum contacts standard elucidated in *International Shoe Co. v. Washington*² to exercises of in rem jurisdiction and particularly to the exercise of quasi in rem jurisdiction. The Court announced, as a general proposition, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."³ The appellants in this case were sued in Delaware by a nonresident plaintiff who filed for a sequestration of Delaware property of the nonresident defendants. The trial court sequestered a significant amount of the defendants' stock by placing a "stop transfer" order on the books of the Greyhound corporation. Apparently, none of the certificates representing the seized property were physically present in Delaware. The appellants argued that the *ex parte* sequestration did not afford them due process of law, and that the property was not subject to attachment in Delaware.

Although the Court relied on both the constitutional argument of appellants and the remedy afforded by the standard enunciated in *International Shoe*, it is apparent that pragmatic considerations had much influence on the decision not to permit quasi in rem jurisdiction in this instance. The Supreme Court noted that cases of this type present the clearest illustration of the need for a single standard for assessing allegations of jurisdiction. The Court pierced the quasi in rem fiction, stating that especially in the instance of a sequestration proceeding, the underlying purpose is to compel a personal appearance by the defendant. The Court said that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."⁴ It is this author's opinion that the language of Indiana Trial Rules 4.4 and 64 is consistent with the holding expressed by the United States Supreme Court in this case.⁵

¹97 S. Ct. 2569 (1977).

²326 U.S. 310 (1945).

³97 S. Ct. at 2584-85.

⁴*Id.* at 2583.

⁵IND. R. TR. P. 4.4 outlines the requirements for service of process on non-residents for acts done within this state; it is the so-called "long-arm" provision of the trial rules. IND. R. TR. P. 64 outlines procedures and requirements for seizure of persons or property, including attachment and garnishment.

For an application of this decision in Indiana law, see *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977), in which the Indiana Court of Appeals stated that a dissolution of marriage, while traditionally characterized as an in rem proceeding, must now meet the "minimum contacts" test described in *Shaffer v. Heitner*. The court held that the minimum contacts test must be applied to two issues

2. *Service of Process*.—In *Roberts v. Watson*,⁶ the Indiana Court of Appeals held that mere compliance with the procedures for service of process outlined by Trial Rule 4.1(A)(1) will not be sufficient where there is no actual service.⁷ The summons issued in this case, naming Opal V. and Ronald G. Roberts as defendants, went to the residence of Ronald G. Roberts, then separated from his wife. Opal first learned of the action when judgment was executed against her. The court held that the service of process did not conform to Trial Rule 4.1(A)(1) since the agent selected by plaintiffs, the United States Postal Service, did not *in fact* send the summons and complaint to Opal's "residence, place of business, or place of employment." The court believed the risk of misfeasance should be born by the party utilizing a particular means of service rather than the party prejudiced by the lack of notice and opportunity to be heard.⁸ The court also rejected plaintiffs' contentions that the service was sufficient under Trial Rule 4.6(A)(2), which provides for service on organizations, or that the service was "reasonably calculated to inform" according to Trial Rule 4.15(F), holding that Trial Rule 4.15 has no application where there has not been actual service on a party.⁹

in a dissolution proceeding: (1) whether there are requisite minimum contacts present to allow the court to adjudicate the marital status of the parties, and (2) whether there are requisite minimum contacts present to allow the court to adjudicate the rights and obligations which are incidents to the marriage. Applying two different levels of minimum contacts, the court noted on the first issue that an Indiana residence of one of the parties satisfied the minimum contacts needed to adjudicate marital status (*i.e.*, enter a decree). However, as to property rights, etc., the court said that minimum contacts are satisfied if the nonresident can be categorized under Trial Rule 4.4(A)(7) or another constitutionally permissible standard, or, if the nonresident fails to make a timely objection to the exercise of *in personam* jurisdiction. The court of appeals found that *in personam* jurisdiction could not properly be asserted under either standard necessary as a prelude to adjudication of rights and obligations. Hence, the court of appeals affirmed as to the portion of the decree effecting the dissolution of marriage but reversed that part which dealt with adjudication of the rights and obligations. Note that the jurisdictional issues were resolved against the backdrop of the Supreme Court's discussion in *Shaffer v. Heitner*.

⁶359 N.E.2d 615 (Ind. Ct. App. 1977).

⁷IND. R. TR. P. 4.1(A)(1) provides in part:

Service may be made upon an individual, or an individual acting in a representative capacity, by (1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter

⁸359 N.E.2d at 619-20.

⁹The court summarily rejected a claim that Opal and Robert became partners by estoppel when they entered into a commercial lease with plaintiffs, stating that defendants held themselves out as husband and wife, not partners. *Id.* at 620.

3. *Coordinate Jurisdiction*.—In *State ex rel. International Harvester Co. v. Allen Circuit Court*,¹⁰ the facts disclosed that the City of Fort Wayne and the City of New Haven had been attempting to annex the same geographical area for a number of years. Remonstrances were filed in the Whitley Circuit Court, protesting the actions of New Haven (1972), and in the Allen Circuit Court, protesting the actions of Fort Wayne (1974). The general rule has been that where two courts of coordinate jurisdiction exert authority over cases where there is *identity* of subject matter and *identity* of parties, the jurisdiction of the court first acquiring jurisdiction is exclusive until final disposition of the case. In *International Harvester*, the Indiana Supreme Court discussed the extent to which the general rule would apply to cases where parties and subject matter are only *substantially* similar.

Justice DeBruler, writing for a unanimous court, said that, notwithstanding the lack of identity of parties, the similarity of issues was substantial enough to require a writ ordering the Allen Circuit Court to stay its proceedings pending final adjudication by the Whitley Circuit Court. While not establishing a litmus test for cases of this nature, the court relied on the "outcome determinative" nature of the proceedings sought to be stayed.¹¹ This indicates that the extent to which an exercise of jurisdiction would be outcome-determinative may be the focus of analysis in further battles over coordinate jurisdiction when there is only substantial similarity between subject matter and parties.

4. *Municipal Notice Statutes*.—An apparent conflict has developed among the districts of the Indiana Court of Appeals as to interpretations of the statutes requiring notice of claim as a condition precedent to suit against municipal entities.¹² A recent decision of the Third District Court of Appeals in *City of Fort Wayne v. Cameron*¹³ appears to conflict with a prior decision of the Second District in *Geyer v. City of Logansport*¹⁴ on the issue of substantial compliance with statutory notice requirements. In *Cameron* and *Geyer*, no timely notice was given by the plaintiffs, but the respective municipal police agencies conducted investigations of the incidents; both plaintiffs were shot by police officers of the municipalities. The Second District Court of Appeals in *Geyer* held that actual knowledge of the accident, as well as an investigation of the accident conducted by the municipality, satisfied notice re-

¹⁰352 N.E.2d 487 (Ind. 1976).

¹¹*Id.* at 489.

¹²See, e.g., IND. CODE § 34-4-16.5-7 to -12 (1976).

¹³349 N.E.2d 795 (3d Dist. Ind. Ct. App. 1976).

¹⁴346 N.E.2d 634 (2d Dist. Ind. Ct. App. 1976).

quirements of the applicable statute.¹⁵ On the other hand, the *Cameron* court held that "mere actual knowledge" of the occurrence by municipal agents is insufficient¹⁶ and stressed the necessity of the plaintiff actually giving the notice required by the relevant statute.¹⁷

The First District, in *City of Indianapolis v. Satz*,¹⁸ described the disparity in the above-cited cases as drawing a "fine line between substantial compliance and non-compliance" with notice statutes.¹⁹ The First District distinguished *Cameron* from *Geyer*, stating that the investigation in *Cameron* was a routine matter that was required whenever a police officer discharged a weapon on duty, while the *Geyer* investigation was conducted by the sheriff and the insurer of the defendant city. Yet, the distinction noted does not appear to be consistent with the conclusion of the First District that where "the purpose of the notice statute has been fulfilled there is substantial compliance with said statute."²⁰ The fact remains that there is no definitive ruling on what criteria fulfill the purpose of the municipal notice statutes, and the stage appears to be set for a final disposition by the supreme court.²¹

¹⁵The statute here at issue, ch. 16, § 1, 1967 Ind. Acts 21, was repealed in 1974. For present law, see IND. CODE § 34-4-16.5-7 (1976), which substituted a 180-day notice period for the prior 60-day period.

The court relied on *Aaron v. City of Tipton*, 218 Ind. 227, 32 N.E.2d 88 (1941), which held that the purpose of statutes requiring notice to a municipality was to inform the city with reasonable certainty as to time, place, and cause of the accident.

¹⁶349 N.E.2d at 800 (citing *Touhey v. City of Decatur*, 175 Ind. 98, 93 N.E. 540 (1911)).

¹⁷*Id.* at 800 (citing *Thompson v. City of Aurora*, 263 Ind. 187, 325 N.E.2d 839 (1975)).

¹⁸361 N.E.2d 1227 (1st Dist. Ind. Ct. App. 1977).

¹⁹*Id.* at 1230.

²⁰*Id.* at 1231 (citing *Galbreath v. City of Indianapolis*, 253 Ind. 472, 479, 255 N.E.2d 225, 229 (1970)).

²¹After the Survey went to press, the Indiana Supreme Court handed down two companion cases reversing the Third District Court of Appeals in *City of Fort Wayne v. Cameron* and reversing in part and affirming in part the Second District Court of Appeals decision in *Geyer v. City of Logansport*.

In *Geyer v. City of Logansport*, 370 N.E.2d 333 (Ind. 1977), the supreme court reversed the court of appeals determination that the notice requirements were fulfilled, thus barring recovery against the city, but affirmed that part of the decision permitting suit against the police officer in his individual capacity. The supreme court stated that the purpose of the notice statute is to inform the city officials with "reasonable certainty" of the accident and circumstances in order that the city may determine possible liability and prepare a defense to the claim. In addition, the court noted that the clear language of the statute in question placed an affirmative duty upon the plaintiff to *deliver a writing* to the city that described the claim.

In reversing *City of Fort Wayne v. Cameron*, 370 N.E.2d 338 (Ind. 1977), the supreme court simply held that if a party was mentally and physically incapacitated to the extent that he could not comply with the provisions of the notice statute, he will have a "reasonable time after his disability was removed within which to file the

5. *Change of Venue.*—In the case of *Gulf Oil Corp. v. McManus*,²² the Indiana Court of Appeals construed the meaning of the term "trial" in the context of the waiver provisions of Trial Rule 76(7).²³ After the appellee had filed a purported class action, the trial court, pursuant to Trial Rule 23(C)(1), set a class action determination hearing for June 13, 1974. The trial court set this date by order book entry on May 14, 1974. On June 6, 1974, after the order setting the hearing, but before the hearing itself, appellee moved for a change of venue, which was granted by the trial court. After denial of a motion to vacate the change of venue, appellants perfected an interlocutory appeal.

In considering whether a Trial Rule 23(C)(1) hearing constitutes a trial, the court of appeals first considered the general notion of a "trial" as an adjudication upon the factual merits of a claim and a disposition of a "distinct and definite branch of the litigation."²⁴ The court then drew an analogy to the "collateral order doctrine" of *Eisen v. Carlisle & Jacqueline*.²⁵ *Eisen* held that the determination under the counterpart federal rule, at least where there are no viable individual plaintiffs, constitutes a final judgment. The court of appeals held that the hearing provided by Trial Rule 23(C)(1) resulted in a collateral order disposing of a distinct branch of the litigation, and the appellee had waived his right to a change of venue by failure to object or request a change for more than three weeks after the May 14, 1974, entry. However, Judge Staton, in concluding his dissenting opinion, wrote that "23(C)(1), by its own terms denies any finality on the merits."²⁶

notice to the city." To hold otherwise, said the court, would be to deprive a litigant of his constitutional right to a "remedy by due course of law."

The *Satz* decision is the subject of a petition to transfer filed with the supreme court June 1, 1977.

²²363 N.E.2d 223 (Ind. Ct. App. 1977).

²³IND. R. TR. P. 76(7) provides in part:

[A] party shall be deemed to have waived a request for a change of judge or county if a cause is set for trial before the expiration of the date within which a party may ask for a change, evidenced by an order-book entry and no objection is made thereto by a party as soon as such party learns of the setting for trial. Such objection, however, must be made promptly and entered of record, accompanied with a motion for a change from the judge or county (as the case may be) and filed with the court.

²⁴363 N.E.2d at 225.

²⁵417 U.S. 156 (1974).

²⁶363 N.E.2d at 227 (Staton, J., dissenting). IND. R. TR. P. 23(C)(1) provides: As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

In the case of *State Travelers Insurance Co. v. Madison Superior Court*,²⁷ the Indiana Supreme Court clarified the availability of automatic change of venue to a third-party defendant. The plaintiff sued to recover for damages resulting from an automobile accident. Eventually, the plaintiff's complaint was dismissed and the defendant received a default judgment on a counterclaim. The defendant then filed a motion in a proceeding supplemental to enforce the default judgment, and the original plaintiff (now the judgment defendant) filed a summons and third-party complaint against Travelers Insurance Company. Travelers responded with a motion to dismiss and a motion for a change of venue, both of which were overruled by the trial court. Travelers subsequently petitioned the supreme court to vacate the trial court's order denying the motion for change of venue. The supreme court commented generally that proceedings supplemental are considered to be summary; no answer or affidavit is intended or required. Here, however, the dispute between Travelers and the judgment defendant presented a new issue, not summary in nature. The court held that the new issue required a responsive pleading and was therefore governed by Trial Rule 76(2).²⁸

The supreme court carefully distinguished *State Travelers Insurance* from *State ex rel. Yockey v. Superior Court*,²⁹ which held that for purposes of Trial Rule 76 the issues shall be deemed first closed on the merits upon the filing of the defendant's *original* answer.³⁰ The court said the competing policies that were balanced in *Yockey*, considerations of a fair trial and the need to avoid protracted litigation, are presented in a different light when a third party defendant is impleaded subsequent to the original complaint. The court refused to extend the holding of *Yockey* and ruled that the issue between Travelers and the judgment defendant had not been closed at the time the motion was filed and that the trial court was required to grant the change of venue.

²⁷354 N.E.2d 188 (Ind. 1976).

²⁸IND. R. TR. P. 76(2) provides in part:

In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for a change of judge or change of venue shall be filed not later than ten [10] days after the issues are first closed on the merits.

²⁹261 Ind. 504, 307 N.E.2d 70 (1974), discussed in Harvey, *Civil Procedure and Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 88, 98 (1976) [hereinafter cited as Harvey, 1976 Survey].

³⁰Strictly construed, this "original" answer would have been the answer of the original defendant in the primary personal injury lawsuit.

B. *Pleadings and Pre-Trial Motions*

1. *Attacks on Jurisdiction.*—The defendant in *Weenig v. Wood*³¹ moved to dismiss the complaint pursuant to Trial Rule 12(B)(2), alleging that there was no showing made in the pleadings that the extraterritorial summons served on defendant was sufficient to satisfy the requirements of Trial Rule 4.4 and confer personal jurisdiction. The Indiana Court of Appeals stated that there is a presumption under our current rules of procedure, as well as under past practice,³² that the court has jurisdiction over the parties as well as the subject matter. Therefore, the plaintiff need not make jurisdictional allegations in the complaint. Should the defendant choose to attack the presumption of jurisdiction, he bears the burden of proof upon that issue, unless the lack of jurisdiction is apparent on the face of the complaint. The court noted that a defendant may attack jurisdiction in one of two ways. He may plead it as an affirmative defense under Trial Rule 8(E), or he may simply move to dismiss under Trial Rule 12(B)(2) for lack of personal jurisdiction. The court held that the defendant in *Weenig* had not carried his burden in the 12(B)(2) motion presented; consequently, the trial court had properly denied the motion to dismiss.³³

An important caveat to the presumption of subject matter jurisdiction noted in *Weenig* is found in the decision of the Seventh Circuit Court of Appeals in *Sparkman v. McFarlin*³⁴ in which the Seventh Circuit discussed the jurisdictional limits of an Indiana circuit court judge with general jurisdictional powers conferred by statute.³⁵ Despite the general grant of power, the court held that a

³¹349 N.E.2d 235 (Ind. Ct. App. 1976).

³²*Id.* at 240 (citing *First Bank v. Crumpacher*, 120 Ind. App. 317, 90 N.E.2d 912 (1950)).

³³To the same effect as *Weenig v. Wood*, regarding the presumed jurisdiction of a court, is *Cunningham v. Universal Battery Div.*, 352 N.E.2d 83 (Ind. Ct. App. 1976), holding that in a suit to enforce a foreign judgment it is not necessary to allege jurisdiction of the foreign court, an allegation of the judgment itself being sufficient to place the matter in issue.

³⁴552 F.2d 172 (7th Cir. 1977).

³⁵IND. CODE § 33-4-4-3 (1976) states:

Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

judge may not "arbitrarily" order or approve anything presented to him. The court said that the action of the trial court must have a statutory or common law basis in order to qualify as a valid exercise of jurisdiction. Moreover, the court stated that an action of the trial court must have a rational relation to existing statutory or common law principles in order to qualify as a valid exercise of the court's inherent power to fashion new common law.³⁶

2. *Collateral Estoppel*.—In *Ragnar Benson, Inc. v. William P. Jungclaus Co.*,³⁷ the same defendants were sued for damages arising from the same construction accident by two different plaintiffs in separate courts of general jurisdiction (Hancock Circuit Court and Marion Superior Court). One aspect of the litigation in both the Marion and Hancock courts was a cross-claim filed by the appellant (defendant #1) against the appellee (defendant #2) for indemnification. The Marion Superior Court granted the appellee's motion to dismiss with respect to the cross-claim and entered final judgment on the matter. Thereafter, the appellee made this dismissal in the Marion court the subject of a motion for summary judgment on the identical cross-claim filed in the Hancock court. The appellee asserted collateral estoppel, based on the prior dismissal in the Marion court. The trial court granted summary judgment and the court of appeals affirmed that decision.

The court of appeals held that a final judgment entered on a motion to dismiss under Trial Rule 12(B)(6) constitutes an adjudication on the merits, which will bar a subsequent assertion of the issues which were the subject of the motion. By way of limitation, the court said that not all Trial Rule 12(B) dismissals would bar later claims. For example, a 12(B)(6) motion would not bar a later claim, if based on the absence of a real party in interest.³⁸ The court rejected the appellant's argument that collateral estoppel applied only to actions initiated subsequent to a final determination, and it stated that it is the entry of judgment of dismissal which provides the foundation for estoppel, not a ruling denying the same.

3. *Motion to Strike*.—In the case of *Nihiser v. Sendak*,³⁹ the plaintiff sought injunctive relief to restrain the enforcement of a statute which labelled the display of obscene films a nuisance. One of the motions filed by the defendants was a motion to strike a paragraph of the plaintiff's complaint pursuant to Federal Rule of

³⁶The *Sparkman* case discussed the concept of subject matter jurisdiction in the context of judicial immunity.

³⁷352 N.E.2d 817 (Ind. Ct. App. 1976), vacating 340 N.E.2d 361 (Ind. Ct. App. 1976). See also *Harvey*, 1976 Survey, *supra* note 29, at 105.

³⁸352 N.E.2d at 820 (citing *State v. Rankin*, 260 Ind. 228, 294 N.E.2d 604 (1973)).

³⁹405 F. Supp. 482 (N.D. Ind. 1974).

Civil Procedure 12(F), which is identical to its counterpart in the Indiana Trial Rules. The paragraph stated generally that the defendants were "harassing" the plaintiff's business enterprise without providing notice and an opportunity to be heard.⁴⁰ The defendants alleged that the vagueness of the paragraph in question required that it be stricken. The district court denied the motion, stating first that motions to strike are viewed with disfavor and infrequently granted. In order to prevail, the court held that the movant must show that the challenged allegation is unrelated to the plaintiff's claims and so unworthy of defense that its presence will prejudice the defense. In the instant case, the court said that while the paragraph may be vague in content, it was consistent with the plaintiff's allegations and could not cause any prejudice to the defendants.

4. *Pleadings Under the Trial Rules.*—The case of *Nelson v. Butcher*⁴¹ serves as a reminder to counsel to evaluate possible procedural defects in light of our modern trial rules. In an action for default on a land contract, the appellants filed a counterclaim for wrongful ejectment. The appellees claimed that this issue became moot when appellants neither posted bond nor remained in possession during trial, as required by a statutory provision.⁴² The Indiana Court of Appeals held that the authority cited was not sufficient to establish a waiver of claim under the new rules of procedure. The court said that Trial Rules 12(A) and 13(B) distinguish between permissive and mandatory counterclaims, "but abrogate all restrictions on the right to plead a counterclaim."⁴³

5. *Third-Party Practice.*—In *City of Elkhart v. Middleton*,⁴⁴ the Indiana Supreme Court, in a case of first impression, examined the relationship between Trial Rules 14 and 20, which generally describe procedures for third-party practice in Indiana. Plaintiff, a construction contractor, sued the City of Elkhart for damages incurred due to additional labor costs allegedly resulting from faulty plans supplied by the city. The city then attempted to file a third-party complaint against the estate of Middleton (the engineer on the project)

⁴⁰Specifically, the paragraph at issue stated: "And further, [the defendant should be enjoined] from otherwise harassing plaintiff in the conduct of its lawful business, without first securing and providing for, after due notice to the plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense." *Id.* at 497.

⁴¹352 N.E.2d 106 (Ind. Ct. App. 1976).

⁴²Ch. 254, § 3, 1927 Ind. Acts 741 (repealed 1973). For present law, see IND. CODE § 32-6-1.5-1 to -12 (1976).

⁴³352 N.E.2d at 114.

⁴⁴356 N.E.2d 207 (Ind. 1976). Also discussed in Harvey, 1976 *Survey*, *supra* note 29, at 100.

pursuant to Trial Rule 14(A).⁴⁶ The trial court denied this effort, and the court of appeals affirmed,⁴⁷ holding that the application of Trial Rule 14(A) is within the discretion of the trial court, subject to reversal only for abuse of discretion.

The supreme court, speaking through Justice Prentice, vacated the opinion of the court of appeals, with respect to its application of Trial Rule 14(A), and held that the review for abuse of discretion must "evaluate the action of the trial court upon the reasons specifically articulated."⁴⁸ Such review may not be based upon reasons postulated by the reviewing court merely to uphold the decision of the trial court. Quoting extensively from a treatise on the subject,⁴⁹ the court noted that the scope of discretion of the trial court vis-a-vis Trial Rule 14 centered on a just, speedy, and inexpensive determination of the cause, seeking to avoid inconsistent results and multiple litigation. Here, the findings of the trial court dealt with the merits of appellant's claim, rather than the procedural effects of its grant or denial; this substantive focus was incorrect, and therefore the trial court had abused its discretion.

The lesson of the case is clear. When reviewing the propriety of Trial Rule 14 motions, the trial court does have discretion, but that discretion must be directed at the underlying purpose of the rule. If the right to implead is at issue, the trial court must rest its decision upon procedural factors, such as considerations of delay, complications of trial, and prejudice to the parties. The use of discretion over third-party practice to determine substantive or jurisdictional questions is improper and an abuse of discretion. It would seem that this decision has direct impact upon review of other discretionary acts of a trial court, at least when the discretion is directed at a procedural aspect which sets forth clearly articulated purposes as guideposts for the trial judge.

C. *Pre-Trial Procedures and Discovery*

1. *Guardian for Minor.*—In *Richardson v. Brown*,⁵⁰ the minor plaintiff filed suit in her name alone seeking recovery for personal injuries. On the first day of trial, the plaintiff moved to substitute a

⁴⁶IND. R. TR. P. 14(A) provides in part: "A defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him"

⁴⁷*City of Elkhart v. Middleton*, 346 N.E.2d 274 (Ind. Ct. App. 1976), *vacated*, 356 N.E.2d 207 (Ind. 1976).

⁴⁸356 N.E.2d at 210.

⁴⁹2 W. HARVEY, *INDIANA PRACTICE* 86 (1970).

⁵⁰362 N.E.2d 197 (Ind. Ct. App. 1977).

court-appointed guardian as plaintiff. The trial court refused this request. On appeal from an adverse judgment, the Indiana Court of Appeals agreed with the plaintiff's contention that the language of Trial Rule 17(C)⁵⁰ is mandatory in nature and permits no discretion by the trial court in permitting representation of an incompetent by a guardian. However, the court went on to state that the error committed by the trial court must be considered in conjunction with Trial Rule 61.⁵¹ On this standard, the appellant must show not only that error occurred, but that the error "was prejudicial and harmed her case."⁵² Since the plaintiff had failed to demonstrate such prejudice, the court of appeals found no reversible error and affirmed.

2. *Intervention by Insurer.*—Trial Rule 24 was the focus of attention in *Vernon Fire & Casualty Ins. Co. v. Matney*.⁵³ Matney was injured in an accident caused by an uninsured motorist (Thoms) and subsequently filed an action against Thoms. Matney notified his insurer, Vernon, of the initiation of the suit. In addition, Matney gave Vernon detailed notice of every major step in the litigation between Matney and Thoms. Following a favorable judgment, Matney demanded payment under the uninsured motorist provisions of his policy and Vernon refused. Matney then filed an action against Vernon and received summary judgment therein. On appeal, Vernon challenged the effect of the Thoms judgment and claimed prejudice due to lack of intervention. The court reasoned that where the insured files suit against an uninsured motorist without joining the insurance carrier, the "interests of justice, the avoidance of multiple litigation and the conservation of judicial time"⁵⁴ compel a conclusion

⁵⁰IND. R. TR. P. 17(C) states in part:

The court, upon its own motion or upon the motion of any party, must notify and allow the representative named in subsection (3) of this subdivision, if he is known, to represent an infant or incompetent person, and be joined as an additional party in his representative capacity. If an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him.

⁵¹IND. R. TR. P. 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

⁵²362 N.E.2d at 199.

⁵³351 N.E.2d 60 (Ind. Ct. App. 1976). The case represents the first explicit recognition of an insurer's right to intervene.

⁵⁴*Id.* at 64.

that would require intervention by an insurer. The court concentrated on the language of Trial Rule 24(A)(2), which confers the right to intervene on a party when the litigation "may as a practical matter impair or impede his ability to protect his interest . . ."⁵⁵

Here, the court noted that if intervention were not allowed, a formidable barrier would be placed before the carrier in a subsequent suit due to the stare decisis effect of the decision.⁵⁶ Moreover, a decision not permitting intervention would allow the insured and insurer to continue litigation until a favorable judgment is received, ignoring adverse results of the initial litigation. Since Vernon had received ample notice of the original action, the court held that it was obligated to intervene if it desired to raise any of the defendant's defenses and would be bound by the judgment against Thoms absent such intervention.

3. *Discovery*.—The Indiana Court of Appeals in *Newton v. Yates*⁵⁷ directed considerable attention to Trial Rule 26(B). The attempted discovery in this case related to a claim against an insurer for punitive damages; this claim evolved from the primary suit seeking recovery from an uninsured motorist (Yates). Newton had filed a motion for discovery of an extensive amount of documentary material of the insurer, the greater portion of which was excluded by the trial court. The court of appeals grounded its review in the two-step approach enunciated in Trial Rule 26(B), namely, (1) that the matter requested must be relevant to the issues to be tried, and (2) if relevant, the matter must not be protected by a privilege or immunity. The court first held that the trial court's *in camera* inspection of the disputed documents, while a rare occurrence, is a valid exercise of discretion. The court then considered the question of privilege, citing a line of federal cases flowing from *Hickman v. Taylor*,⁵⁸ and expanding the scope of immunity to include: agents of attorneys,⁵⁹ information gathered in anticipation of litigation by the client,⁶⁰ privilege of a corporation as a client when consulting an attorney in a legal capacity,⁶¹ and the extension of the attorney-client

⁵⁵IND. R. TR. P. 24(A)(2) provides:

Upon timely motion anyone shall be permitted to intervene in an action when the applicant claims an interest relating to a property fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

⁵⁶351 N.E.2d at 64.

⁵⁷353 N.E.2d 485 (Ind. Ct. App. 1976).

⁵⁸329 U.S. 495 (1947) (establishing the "work product" rule).

⁵⁹Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

⁶⁰Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962).

⁶¹Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314 (7th Cir. 1963).

privilege to attorneys who are exclusive employees of a corporation (i.e., house counsel).⁶²

The court endorsed these decisions and held that the documents at issue fell within their purview. In addition, the court held that a mere allegation of need and unavailability will not establish the "good cause" necessary to overcome a privilege.⁶³ Finally, the court recited and endorsed the "principle of judicial parsimony," which allows a court to delay or suspend discovery on one issue if the outcome of another issue will dispose of the entire case.⁶⁴

The Indiana Supreme Court in *Chambers v. Public Service Co.*⁶⁵ vacated a decision of the court of appeals which had reversed a trial court ruling on certain interrogatories proffered by appellant. The supreme court held that although the term "relevance" has greater latitude in discovery than at trial, "the information sought must be admissible or reasonably calculated to lead to admissible evidence."⁶⁶ In examining the rejected interrogatories, the court held that none of the information sought was relevant to the issues at trial in the land condemnation proceeding. The decision obviously vitiates the use of discovery techniques as a means to engage in a "fishing expedition" and indicates that the question of relevance in a discovery dispute must be resolved with an eye to the ultimate issues to be tried in the particular case.

With respect to the use of depositions at trial in lieu of oral testimony,⁶⁷ the Indiana Court of Appeals in *Wells v. Gibson Coal Co.*⁶⁸ held that the application of Trial Rule 32(A)(3) is to be tempered with trial court discretion.⁶⁹ Thus, where the deposition in issue is replete with explicit statements emphasizing the witness' inability to attend the trial, it is not necessary that corroborating

⁶²Malco Mfg. Co. v. Elco Corp., 45 F.R.D. 24 (D. Minn. 1968).

⁶³353 N.E.2d at 492 (citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2025 (1970) dealing with the analogous federal rule and the standards set forth therein).

⁶⁴353 N.E.2d at 491. See also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2040 (1970).

⁶⁵355 N.E.2d 781 (Ind. 1976).

⁶⁶*Id.* at 784.

⁶⁷IND. R. TR. P. 32(A) states in part:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

⁶⁸352 N.E.2d 838 (Ind. Ct. App. 1976).

⁶⁹*Id.* at 841.

evidence be presented to support the trial court's determination that the deposition falls within the guidelines of 32(A)(3)(c). Of course, this discretionary power also applies to other appropriate categories of Trial Rule 32(A)(3).⁷⁰

Finally, the court of appeals in *Burger Man, Inc. v. Jordan Paper Products, Inc.*⁷¹ held that although a Trial Rule 33 interrogatory is a proper method to discover the *existence* of documents, it is not a device to compel *production* of those documents. A Trial Rule 34 motion to produce documents is the proper procedure to compel production. To hold otherwise, said the court, would allow parties to use interrogatories to by-pass the strict requirements of Trial Rule 34 with respect to the particularity of inspection and the need to specify a reasonable time, place, and manner for inspection of documents produced.⁷²

D. Trial and Judgment

1. *Voir Dire*.—*Anderson v. State*,⁷³ although a criminal case, has important implications for voir dire examination in civil cases. At issue was a local rule that limited voir dire to a total of 20 minutes, requiring counsel to reserve time for subsequent rounds. In its decision, the Indiana Court of Appeals noted that under Trial Rule 47 and Criminal Rule 12 the trial court has discretion on whether or not to allow attorneys to question prospective jurors directly or whether to conduct the examination itself. However, the court could find no rule or decision which abolished the right of attorneys to ask questions indirectly on voir dire. While recognizing the possibility of waste and abuse,⁷⁴ the court could find no support for an inflexible time limit as a proper restriction on voir dire. The court distinguished recent Indiana Supreme Court opinions which sanctioned remedial practices which either eliminate all direct voir dire interrogation⁷⁵ or permit only twenty minutes of direct examination, supplemented by questions submitted by the parties through the judge. The court held that the rule as applied in the instant case contravened the right to a trial by an impartial jury and the correlative right to participate in voir dire to the extent necessary for an intelligent exercise of peremptory challenges.⁷⁶

⁷⁰*Cf. Cooper v. Indiana Gas & Water Co.*, 362 N.E.2d 191 (Ind. Ct. App. 1977) (citing *Wells* and applying the discretionary standard to Trial Rule 32(A)(3)(e)).

⁷¹352 N.E.2d 821 (Ind. Ct. App. 1976).

⁷²*Id.* at 827.

⁷³359 N.E.2d 594 (Ind. Ct. App. 1977).

⁷⁴*Id.* at 598.

⁷⁵*Id.* (citing *White v. State*, 330 N.E.2d 84 (Ind. 1975)).

⁷⁶*Id.* (citing *Owens v. State*, 333 N.E.2d 745 (Ind. 1975); *Hart v. State*, 352 N.E.2d 712 (Ind. 1976)).

In the case of *Hunter v. State*,⁷⁷ another local court practice governing voir dire was at issue. The trial court had issued an order which required submission of questions twenty-four hours prior to trial. The state failed to comply with this order but was permitted to conduct oral voir dire after the court's examination. The defendant had complied with the order. The court of appeals rejected appellant's equal protection argument, stating that the conduct of voir dire is within the discretion of the trial court, subject to reversal only for abuse of discretion and prejudice resulting therefrom. Noting that the purpose of voir dire is to determine whether a prospective juror is able to deliberate fairly on the issue of guilt,⁷⁸ the court said that the appellant failed to show that the action of the trial court was detrimental to that purpose and therefore affirmed on that issue.

2. *Judgment on the Evidence.*—The Indiana Court of Appeals in *McKeown v. Calusa*⁷⁹ discussed the proper factors to be addressed in considering a Trial Rule 50 motion for judgment on the evidence. The court noted that the trial court is not allowed to weigh evidence or to resolve credibility questions in order to grant such a judgment. Yet, there must be some evidence of probative value⁸⁰ on each element of the claim asserted, and if absent, the motion is properly granted. While the ascertainment of the probative value of direct evidence is seldom problematic, circumstantial evidence does present difficulties. The court stated that if an ultimate fact in issue can exist as a reasonable inference from circumstantial evidence, the motion should be denied, but if the circumstantial evidence does not create a reasonable inference to an ultimate fact, the motion may be granted.

An example of the above reasoning is found in *Huff v. Travelers Indemnity Co.*⁸¹ wherein the Indiana Supreme Court found a grant of judgment on the evidence to be clearly erroneous since the trial court had, in effect, weighed the evidence in order to grant the motion. The court held that where there is relevant evidence to support each essential element of the plaintiff's claim, but the trial court still believes that the weight of the evidence is contrary to the verdict, then the appropriate remedy is an order for a new trial pur-

⁷⁷360 N.E.2d 588 (Ind. Ct. App. 1977).

⁷⁸*Id.* at 594 (citing *Lamb v. State*, 348 N.E.2d 1 (Ind. 1976)).

⁷⁹359 N.E.2d 550 (Ind. Ct. App. 1977).

⁸⁰The court defines evidence of probative value as evidence "carrying the quality of proof and having fitness to induce conviction upon each element of the claim" *Id.* at 553.

⁸¹363 N.E.2d 985 (Ind. 1977). See also *Harvey, 1976 Survey, supra* note 29, at 97.

suant to Trial Rule 59(E), not a judgment on the evidence under Trial Rule 50.⁸²

3. *Declaratory Relief*.—In *City of Evansville v. Grissom*,⁸³ the Indiana Court of Appeals stressed the basic requirement that a justiciable controversy exist between parties before a declaratory judgment is proper. In this case, every allegation found in appellant's complaint was admitted in appellee's answer. Moreover, each party prayed for the same relief, asking that certain statutes be declared unconstitutional. Holding that the appellant did not present the trial court with a "true adversary situation upon which every decision must rest,"⁸⁴ the court affirmed the dismissal of the complaint.

4. *Summary Judgment*.—The issue in *Equitable Life Assurance Society of the United States v. Crowe*⁸⁵ was whether the trial court had met the required two-prong test in granting a summary judgment, namely, (1) that the trial court make an affirmative finding that there is no genuine issue as to any material fact, and (2) that the court state with particularity its reasons for granting a summary judgment.⁸⁶ Appellant relied on the second prong of the test, as codified in Trial Rule 56(C), and argued that the trial court had erred by failing to designate the issues and claims which presented no genuine issue as to any material fact. The court of appeals found this contention meritless, quoting an author on the subject to the effect that the "purpose of the rule is to enable the case to proceed in an orderly manner if partial summary judgment is entered."⁸⁷ Therefore, when the trial court grants a summary judgment upon all the issues or claims in the case, the requirement of Trial Rule 56(C) requiring designation of claims and issues is rendered superfluous.

5. *Default*.—In *Henline, Inc. v. Martin*,⁸⁸ the court of appeals held that an *entry of default*,⁸⁹ as opposed to a *default judgment*,⁹⁰ is an appealable ruling as defined by Trial Rule 60(B)⁹¹ and authorized by Trial Rule 60(C). This holding differs from federal practice in which the entry of default is treated as an interlocutory order and

⁸²*Id.* at 994.

⁸³349 N.E.2d 207 (Ind. Ct. App. 1976).

⁸⁴*Id.* at 209.

⁸⁵354 N.E.2d 772 (Ind. Ct. App. 1976).

⁸⁶This test was first enunciated in *Singh v. Interstate Fin. Inc.*, 144 Ind. App. 444, 246 N.E.2d 776 (1969).

⁸⁷354 N.E.2d at 776 (quoting 3 W. HARVEY, INDIANA PRACTICE 542, 547 (1970)).

⁸⁸348 N.E.2d 416 (Ind. Ct. App. 1976).

⁸⁹See IND. R. TR. P. 55(A).

⁹⁰See IND. R. TR. P. 55(B).

⁹¹IND. R. TR. P. 60(B) states: "[T]he [trial] court may relieve a party . . . from a final judgment, order, default or proceeding"

not subject to immediate appeal.⁹² However, even assuming that appellants had properly appealed the mere entry of default, the court held that the trial court had not abused its discretion by refusing to grant relief. The facts showed that a claims adjuster who had received service did not act promptly due to business pressures resulting from a tornado but that he had acted immediately when he noticed the service papers at a later date. The court said that the fact that another trial court might not have abused its discretion by *granting* relief in these circumstances does not permit the inference that the trial court here abused its discretion by *not granting relief*.⁹³

6. *Relief from Verdict.*—Trial Rule 59(E) was the subject of considerable discussion during the survey period; the decisions in *Weenig v. Wood*⁹⁴ and *Nissen Trampoline Co. v. Terre Haute First National Bank*⁹⁵ reversed actions taken by the trial court under the auspices of this rule. In *Weenig*, the trial court reduced a jury verdict for compensatory and punitive damages and entered a judgment for the reduced amount. The plaintiff cross-appealed the reduction, claiming that his constitutional rights had been violated;⁹⁶ simultaneously, the defendant argued that the trial court sits as a "thirteenth juror," and, therefore, the decision was entitled to a strong presumption of correctness, subject to reversal only for abuse of discretion.⁹⁷

In resolving the conflict, the court of appeals first recited those options available to the trial judge who has determined a jury's award to be improper because it is excessive or inadequate. The judge could (1) enter final judgment on the evidence for the amount of proper damages, (2) grant a new trial, or (3) grant a new trial subject to additur or remittitur.⁹⁸ After determining that the form of relief granted by the trial court was allowable under the first option, the court of appeals went on to reverse the trial court's use of the option in this particular case. Although there is authority permitting a trial court to vary a jury award without granting a new trial,⁹⁹ the court held that a trial court could properly exercise that

⁹²See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2692, at 297; § 2693, at 306-07 n.65 (1973).

⁹³348 N.E.2d at 420. See also *Green v. Karol*, 344 N.E.2d 106 (Ind. Ct. App. 1976), discussed in *Harvey*, 1976 Survey, *supra* note 29, at 112.

⁹⁴349 N.E.2d 235 (Ind. Ct. App. 1976).

⁹⁵358 N.E.2d 974 (Ind. 1976).

⁹⁶IND. CONST. art. 1, § 20 provides: "In all cases, the right of trial by jury shall remain inviolate."

⁹⁷The defendant relied on *Bailey v. Kain*, 153 Ind. App. 657, 192 N.E.2d 486 (1963).

⁹⁸See IND. R. TR. P. 59(E)(5).

⁹⁹IND. R. APP. P. 15(N). See generally 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 111 (1971).

authority only when the jury verdict was erroneous as a matter of law. Hence, a trial court is not empowered under Trial Rules 50 or 59 to weigh conflicting evidence and enter a definitive and different judgment.¹⁰⁰ The role of the trial court as a "thirteenth juror" extends only to the ability to weigh evidence in order to prevent an abuse of the jury system, *not* to abrogate it. This permits the trial court to grant a new trial or grant a new trial subject to additur or remittitur, where appropriate, while preserving the constitutional right to a jury trial.

In *Nissen Trampoline*, a sharply divided Indiana Supreme Court shed new light on the ability of a trial court to grant a new trial when the jury's verdict is against the weight of the evidence. In this case, the plaintiff sued Nissen and others to recover for injuries resulting from the use of an "aqua diver" device. Subsequent to a verdict for the defendant, the trial court ordered a new trial pursuant to Trial Rule 59(E)(7)¹⁰¹ and entered findings on the evidence presented. These findings were based upon *undisputed* evidence which showed that the warnings and instructions accompanying the aqua diver were not adequate and that Nissen had knowledge from prior testing that injuries of the type plaintiff sustained could occur, due to the present design of the device. The supreme court reversed,¹⁰² stating that the trial court had failed to set out the "supporting and opposing evidence"¹⁰³ relating to those elements which plaintiff was required to prove under his theory of the case. Apparently, because the trial court was unable to disclose from the evidence presented what kind of warning was required or what design was proper, the decision to grant the new trial was not the

¹⁰⁰Essentially the standards for granting a judgment on the evidence under Trial Rule 50 and a final judgment under Trial Rule 59(E)(5) are equivalent. Judgment on the evidence is appropriate under both rules where there is a total absence of evidence or legitimate inferences therefrom upon an essential issue in plaintiff's case or where the evidence is unconflicting and susceptible of only one inference, and that inference is in favor of the movant. See *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985 (Ind. 1977).

¹⁰¹IND. R. TR. P. 59(E)(7) states in part:

In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a nonadvisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

¹⁰²358 N.E.2d 974 (Ind. 1977) (Givan, C.J., DeBruler & Prentice, JJ., concurring; Arterburn & Hunter, JJ., dissenting with separate opinions).

¹⁰³*Id.* at 977. IND. R. TR. P. 59(E)(7) states: "[I]f the decision is found to be against the weight of the evidence, the finding shall relate the supporting and opposing evidence to each issue upon which a new trial is granted"

result of a rational judicial process but an exercise in speculation and hypothesis.

The need to revise Trial Rule 59(E)(7) in light of *Nissen Trampoline* requires some comment. First, it seems logical to conclude that when Trial Rule 59(E)(7) speaks about a decision against the weight of the evidence, it presupposes a conflict in the evidence and does not address cases where the evidence is undisputed. Second, the language of the section should be revised to preclude a requirement that the trial court must formulate an instruction or speculate on the design of a product. Otherwise, the trial court itself must take an adversary role, a position which is abhorrent to a rational judicial process. Finally, the findings requirement of Trial Rule 59(E)(7) should be applied only to insure fulfillment of its underlying purpose: to prevent arbitrary and capricious awards of new trials and to prevent its use as a technical harpoon to control trial court decisions.

8. *Relief from Judgment*.—The Second District Court of Appeals in *Kelly v. Bank of Reynolds*¹⁰⁴ and the Third District in *In re Marriage of Robbins*¹⁰⁵ severely limited *Yerkes v. Washington Manufacturing Co.*,¹⁰⁶ which had held that the only method for setting aside a default judgment is through the use of a Trial Rule 60 motion. In *Kelly*, suit was filed and the defendant entered an appearance through counsel. Subsequently, the defendant's attorney was granted leave to withdraw. The trial court ruled that the effect of the withdrawal was as if the attorney had never appeared, even though an answer and counterclaim had been filed. The bank asked for and received a default judgment.

Following judgment, the defendant retained new counsel who filed a timely Trial Rule 59(A)(2) motion, claiming accident and surprise. The trial court overruled this motion, stating in part that it was "not the best remedy to attack the question."¹⁰⁷ Counsel then filed a Trial Rule 60 motion which was overruled, but he did not file a second motion to correct errors addressed to the Trial Rule 60 motion. The court of appeals held that where an alleged error of law forms the basis of a default judgment, the allegations may be presented in a motion to correct errors. Hence, the effect of counsel's withdrawal on the status of the pleadings he filed is distinctly a legal issue and is therefore susceptible to question in a

¹⁰⁴358 N.E.2d 146 (2d Dist. Ind. Ct. App. 1976).

¹⁰⁵358 N.E.2d 153 (3d Dist. Ind. Ct. App. 1976).

¹⁰⁶326 N.E.2d 629 (1st Dist. Ind. Ct. App. 1975), discussed in Harvey, *Civil Procedure and Jurisdiction, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 83 (1975).

¹⁰⁷358 N.E.2d at 148.

motion to correct errors. The ruling on the motion to correct errors is a final judgment and an appeal may be taken therefrom, notwithstanding the subsequent Trial Rule 60 motion.

The Third District Court of Appeals in *Robbins* painted with a much broader brush, reasoning that the expansive language of Trial Rule 59(A)(9)¹⁰⁸ as to the sixty-day time period allowed for filing of a motion to correct errors includes the additional equitable purposes stated in Trial Rule 60(B). The court held that a motion stating a Trial Rule 60 purpose, regardless of its denomination, should be treated as a Trial Rule 59 motion if filed within the sixty-day time period.¹⁰⁹ Conversely, after the sixty-day period a motion which states a Trial Rule 60 purpose, regardless of its denomination, must be treated as a Trial Rule 60 motion. If the trial court renders a judgment by granting or denying this Trial Rule 60 motion, a motion to correct errors is a prerequisite to appeal.

In relatively short order, the First District, which had originally authored the *Yerkes* opinion, extended the reasoning of the above-cited cases to the issue presented in *Roberts v. Watson*.¹¹⁰ The court in *Roberts* held that although relief from a void judgment may be sought under Trial Rule 60(B)(6), the appellant's motion to correct errors was a permissible vehicle for allegations of error. The cases, when viewed in *seriatim*, appear to extend the interplay of Trial Rules 59 and 60 far beyond the default grounds before the court in *Yerkes* so as to include all Trial Rule 60 grounds, at least insofar as the sixty-day period after entry of judgment is concerned.¹¹¹

This line of cases has hopelessly obscured the already murky requirements for post-judgment relief in Indiana practice. By whittling at the *Yerkes* decision, these cases create potential problems for the trial counsel who files what he *thinks* is a Trial Rule 60 motion within the sixty-day time limit controlling Trial Rule 59 motions. Relying on *In re Robbins*, the trial judge could, within his discretion, treat that motion as a Trial Rule 59 motion. The overruling of the motion would open the door for a direct appeal by counsel. However, if the same judge retained the same pleading until the

¹⁰⁸IND. R. TR. P. 59(A)(9) allows for correction of errors "[f]or any reason allowed by these rules, statute or other law."

¹⁰⁹Subject, of course, to the "second motion" requirements of IND. R. TR. P. 59. See *Grove, The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

¹¹⁰359 N.E.2d 615 (1st Dist. Ind. Ct. App. 1977).

¹¹¹See *In re Marriage of Robbins*, 358 N.E.2d 153, 156 (Ind. Ct. App. 1976) (concurring opinion); cf. *Covalt v. Covalt*, 354 N.E.2d 766, 768 n.3 (Ind. Ct. App. 1976) (wherein Judge Buchanan states he would place the burden upon the party invoking Trial Rule 60 to show why the issues involved could not have been litigated through a Trial Rule 59 motion).

sixty-first day after judgment, he could rule upon it as a legitimate Trial Rule 60 motion, which would require a motion to correct errors as a prerequisite to appeal.

Furthermore, *Kelly*, which allows a motion to set aside a judgment to be filed as a Trial Rule 59 motion when alleging "purely legal" errors, raises additional questions for the appellate courts. The question of which allegations are "purely legal" and which allegations are "purely factual" creates an abysmal quandary for an appellate court which must determine whether the motion before the court is a timely filed Trial Rule 59 motion or an independent Trial Rule 60 motion which requires a Trial Rule 59 motion as a prerequisite to appeal. The scope of this Article precludes a detailed consideration of all possible ramifications of these decisions, but counsel should be aware of the volatile nature of the subject and the strong possibility that future decisions will be forthcoming.

8. *Correction of Clerical Errors.*—The court of appeals held in *Auto-Teria, Inc. v. Ahern*¹¹² that the trial court had abused its discretion under Trial Rule 60(A)¹¹³ in denying a petition for correction of error where the only evidence before the trial court indicated that a clerical error had been committed and that such refusal would deprive the movant of the right to appeal. The uncontested facts disclosed that appellant's motion to correct errors was filed on June 4, 1973, the last day in which appellant could make a timely filing. However, the court clerk had moved the file stamp to June 5, 1973, in anticipation of the next day's business. The court said that under these circumstances the error was clerical,¹¹⁴ and a nunc pro tunc entry was the appropriate remedy. The court also stated that a writing in the record, such as the motion to correct errors, could be used as the basis of the amended nunc pro tunc entry.

9. *Injunctions.*—In *Cement-Masonry Workers Local 101 v. Ralph M. Williams Enterprises*,¹¹⁵ the trial court granted the plaintiff's request for a temporary restraining order; after an evidentiary hearing the court entered findings of fact and granted a temporary injunction. Thereafter, in a pre-trial order issued prior to the consideration of the plaintiff's request for a permanent injunction, the trial court stated that it would not consider evidence presented in the previous hearing for the temporary injunction because the initial burden and question of proof differed from that considered in the final hearing on the merits. The trial court then granted a permanent injunction and awarded damages.

¹¹²352 N.E.2d 774 (Ind. Ct. App. 1976).

¹¹³IND. R. TR. P. 60(A) permits the court to correct clerical mistakes *sua sponte* or upon motion by a party.

¹¹⁴See 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 205 (1971).

¹¹⁵350 N.E.2d 656 (Ind. Ct. App. 1976).

The Indiana Court of Appeals reversed, stating that although the trial court was not bound by the findings entered in the previous hearing, Trial Rule 65(A)(2) clearly requires that any admissible evidence received in an application for a preliminary injunction "becomes part of the record" at trial.¹¹⁶ Hence, the trial court must *consider* evidence entered in a prior hearing, as well as newly entered evidence, in reaching a decision granting or denying a permanent injunction. The action of the trial court in the instant case, which explicitly precluded consideration of the prior evidence, constituted reversible error.

Trial Rule 65(C) requires that an applicant for a restraining order or preliminary injunction give security in an amount the court "deems proper" for damages actually incurred by a party found wrongfully enjoined. In *Howard D. Johnson Co. v. Parkside Development Corp.*,¹¹⁷ the applicant did post a bond pursuant to Trial Rule 65(C), but following the hearing on the preliminary injunction, one of the defendants argued that the bond was insufficient and requested the trial court to increase the amount of the bond. The trial court refused this request, and eventually the application for a permanent injunction was denied. In the course of the appeal, the defendant alleged that the trial court had erred in not increasing the bond. The court of appeals disagreed, stating first that the time for posting bond had passed when the defendant had made the request; therefore, a subsequent increase would have been more in the nature of a forfeiture than a bond. Second, the fixing of security is a discretionary function of the trial court, and a showing that actual damages exceeded the amount of the bond is not conclusive of an earlier abuse of discretion. However, the court of appeals went on to make an important interpretation of the recovery provision of Trial Rule 65(C). The court stated that the security provision merely serves as a manifestation of the financial responsibility of the plaintiff. Because of the unavoidably speculative factors by which it is fixed, only the surety should be bound by its amount. The court held, therefore, that the recovery of costs and damages by a defendant wrongfully enjoined need not be limited to the amount of the bond posted; the defendant may recover any damages in excess of the bond directly from the plaintiff.¹¹⁸

¹¹⁶IND. R. TR. P. 65(A)(2) states: "[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

¹¹⁷348 N.E.2d 656 (Ind. Ct. App. 1976).

¹¹⁸This decision overrules *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545, 43 N.E. 456 (1896) (holding that absent a showing of malice or lack of probable cause in seeking injunction, defendant's recovery would be limited to the amount of security given).

10. *Special Judges*.—The respondent in *In re May*¹¹⁹ alleged that the trial court judge lacked jurisdiction under Trial Rule 79(11)¹²⁰ to issue a contempt citation because the respondent had named the judge as a defendant in an action for declaratory relief. The court of appeals rejected this contention on two grounds. First, the contempt conviction was based on statements made in a motion to correct errors in an *independent* civil action, rendering Trial Rule 79(11) inapplicable. Second, the court held that a judge may still cite a party for contemptuous statements directed toward the bench, even though the judge will not ultimately hear the merits of the case.¹²¹

E. Appeals

Filing a praecipe for a record of the proceedings is required to initiate an appeal.¹²² The question in *Seco Chemicals, Inc. v. Stewart*¹²³ was whether a cross-appellant must make a separate filing of a praecipe in order to preserve his question for appeal. The court of appeals noted initially that a party must assign and preserve a cross-error by means of a separate motion to correct errors filed fifteen days after the service of the opposing party's motion to correct errors.¹²⁴ Further, the cross-appellant must, within thirty days of the filing of the appellant's brief, file a brief on the issues involved in the cross-error, as well as an answer to the appellant's brief.¹²⁵ The court found that the cross-appellant complied with the above requirements and held that once the appellant invoked appellate jurisdiction by filing its praecipe, the purpose of Appellate Rule 2(A) was fulfilled, and the cross-appellant would be excused from compliance. The court did, however, limit its holding to the facts of the case, wherein the appellant had praecipitated the *entire record*.¹²⁶

In *Indiana State Board of Tax Commissioners v. Lyon & Greenleaf Co.*,¹²⁷ the appellee contended that the appellant had waived the asserted errors based on the appellant's failure to set forth

¹¹⁹358 N.E.2d 138 (Ind. Ct. App. 1976).

¹²⁰IND. R. TR. P. 79(11) provides in part: "Any regular judge . . . shall be eligible for appointment in any of such courts as a special judge in any case pending in which he has not sat as judge or been named on a previous panel, unless he is disqualified by interest or relationship"

¹²¹358 N.E.2d at 139 (citing *Allison v. State*, 243 Ind. 489, 187 N.E.2d 565 (1963)).

¹²²See IND. R. APP. P. 2(A).

¹²³349 N.E.2d 733 (Ind. Ct. App. 1976).

¹²⁴IND. R. TR. P. 59(D).

¹²⁵See IND. R. TR. P. 8.1(A); 8.3(D).

¹²⁶349 N.E.2d at 739 n.1.

¹²⁷359 N.E.2d 931 (Ind. Ct. App. 1977).

specifically in its brief, with the arguments applicable thereto, the errors raised in the appellant's motion to correct errors.¹²⁸ The court of appeals rejected this contention, noting that although the appellants had grouped several specifications of error together, the issues raised were sufficiently articulated. Moreover, each grouping was prefaced with a numerical reference to the appropriate specification in the motion to correct errors. The court said that "where there has been substantial compliance with the rules, a failure to include all that is technically required will not result in a waiver."¹²⁹

Compare, however, the court of appeals ruling in *Brady v. Eastern Indiana Production Credit Association*¹³⁰ wherein the court held that Appellate Rule 11(B)(7)¹³¹ mandates the clerk to collect the \$100 docketing fee before he accepts any appeal as "filed."¹³² In this case, the appellant's time limit for filing an appeal expired on November 18, 1975. The appellant mailed the record to the court clerk on November 17, 1975, but failed to enclose the filing fee. On November 19, 1975, the clerk notified the appellant of his omission, the appellant made arrangements to pay, and the clerk filed the record. Under the facts given, the court ruled that the appellant had not "filed" the appeal until the ninety-first day after the ruling on the motion to correct errors; the appeal, therefore, was properly dismissed.¹³³

Another case construing the requirements of cross-appeal is *P-M Gas & Wash Co. v. Smith*.¹³⁴ The appellees did not file cross-errors within fifteen days after service of the appellant's motion to correct errors but instead included alleged cross-errors and cross-appeals as

¹²⁸IND. R. APP. P. 8.3(A)(7) states that: "Each error assigned in the motion to correct errors that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto."

¹²⁹359 N.E.2d at 933 (citing *Yerkes v. Washington Mfg. Co.*, 326 N.E.2d 629 (Ind. Ct. App. 1975)).

¹³⁰360 N.E.2d 1267 (Ind. Ct. App. 1977).

¹³¹IND. R. APP. P. 11(B)(7) states that appellant must pay a filing fee of \$100 to the clerk "upon the filing of a petition to transfer or an appeal."

¹³²The court distinguished between the "submission" of an appeal and the "acceptance" of the appeal by the clerk. The appeal is not "filed" until the clerk has signified acceptance by endorsing it as filed and recording the same. See 360 N.E.2d at 1269 n.1.

¹³³But see *Peters v. Poor Sisters of Saint Francis Seraph Inc.*, 257 Ind. 360, 274 N.E.2d 530 (1971), in which the supreme court, construing the deposit requirement of the former statute, stated:

We find nothing either in the statutes or in the case law to indicate that the deposit is jurisdictional and required to be filed within the twenty-day period allowed for the filing of petition to transfer. The fact that the deposit was in fact made prior to this Court's determination of the petition was sufficient. *Id.* at 361, 274 N.E.2d at 531.

¹³⁴352 N.E.2d 91 (Ind. Ct. App. 1976).

a part of the appellee's brief on the merits filed in the court of appeals. The appellees argued that the fifteen-day time limitation was applicable only in those cases where the motion to correct errors is based upon evidence outside of the record.¹³⁵ Although the court acknowledged the plausibility of appellee's theory, it said that the clear and separate statement within Trial Rule 59(D) as to time limits dictated a different result. The court quoted authors on the subject¹³⁶ and held that an assignment of cross-errors must be filed within fifteen days after service of the opposing party's motion to correct errors, regardless of whether the motion is, or is not, based on evidence outside of the record. This ruling is consistent with the underlying rationale of Trial Rule 59, which allows the trial court to act upon alleged error without necessitating an appeal.

The question of what constitutes a "judgment" was the subject of several cases in the court of appeals. For example, in *Guido v. Baldwin*,¹³⁷ the trial court in a partition proceeding had vested title to the property in the respective parties. The appellants filed a timely motion to correct errors, and the trial court responded by "amending" its judgment to order a formal survey of the property awarded to appellants. The trial court overruled the motion in all other respects. The appellants' second motion to correct errors was filed and overruled. On appeal, the appellee alleged lack of jurisdiction, apparently on the basis that the amended judgment flowing from the first motion to correct errors would not become "final" until the survey was completed. The court of appeals rejected this argument, stating that the trial court had not disturbed the substantive aspect of its judgment. In this case, the court exercised its discretion under Appellate Rule 4(E) to pass on adjudicated issues which were severable without prejudice to the parties and heard the merits of the disputed ownership claims.

In contrast, the court of appeals found the appellant's reliance on the discretionary features of Appellate Rule 4(E) to be misplaced in *Minor v. Condict*.¹³⁸ The appellant had received a final judgment in the trial court but had failed to include a statement of the judgment in the record. The court of appeals, in granting appellees' motion to dismiss, stated that "a judgment is an essential element of any appeal."¹³⁹ Furthermore, the court said that the discretionary

¹³⁵IND. R. TR. P. 59(D) requires that a party file cross-errors within 15 days after the service of the opposition's motion to correct errors.

¹³⁶352 N.E.2d at 92 (citing 1 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 519 (1972); 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 116 (1971)).

¹³⁷360 N.E.2d 842 (Ind. Ct. App. 1977).

¹³⁸360 N.E.2d 857 (Ind. Ct. App. 1977).

¹³⁹*Id.* at 858 (citing *Citizen's Nat'l Bank v. Harvey*, 334 N.E.2d 719 (Ind. Ct. App. 1975)). See also Harvey, 1976 Survey, *supra* note 29, at 116.

features of Appellate Rule 4(E) apply only where there is an attempted appeal from partial judgment which does not dispose of all the issues. In this case, there was a final judgment disposing of all the issues, but it was being appealed upon an insufficient record. The court tempered this apparently harsh result by pointing out that the appropriate procedure in such a case as this is provided in Appellate Rule 15(D), which allows an application for certiorari to supplement the record with an omitted portion of the transcript. Since appellants had ignored this procedure, the appeal was properly dismissed.

Successful trial counsel should heed the warning given in *Colley v. Carpenter*.¹⁴⁰ The appellee had received a favorable judgment in the trial court and thereafter failed to file an appellee's brief when the cause was brought before the court of appeals. The court of appeals held that the appellant's brief would be deemed to be "accurate and sufficient for the disposition of this appeal."¹⁴¹ Furthermore, the court stated that the appellant must only show *prima facie* error to win reversal.¹⁴² The appellant had presented such a case and, unchallenged by the appellee, was granted a reversal by the court of appeals.

The court of appeals presented a primer to the aspiring appellate attorney in the case of *Anderson v. Indiana State Employees' Appeals Commission*.¹⁴³ The case involves much discussion of the detailed requirements of the Appellate Rules, but the general principles merit attention. In chronological order as they appear in the appellate process, those principles are: First, the allegations in the motion to correct errors must be discussed with sufficient particularity to inform the trial court and subsequently the appellate court of the exact legal issue involved;¹⁴⁴ second, the appellant must bring a record which supports his allegations and will permit an intelligent decision of the issues;¹⁴⁵ third, the brief must be prepared in such a manner as to allow each judge, independently of the record, to consider each question presented;¹⁴⁶ fourth, the appellant must present authority to support his allegations of error or face waiver;¹⁴⁷ and fifth, the appellant must demonstrate actual pre-

¹⁴⁰362 N.E.2d 163 (Ind. Ct. App. 1977).

¹⁴¹*Id.* at 166.

¹⁴²*Id.* (citing *In re Sheeks*, 344 N.E.2d 872 (Ind. Ct. App. 1976)).

¹⁴³360 N.E.2d 1040 (Ind. Ct. App. 1977).

¹⁴⁴*Id.* at 1042 (citing *Johnson v. State*, 338 N.E.2d 680 (Ind. Ct. App. 1975)).

¹⁴⁵*Id.* (citing *Johnson v. State*, 258 Ind. 648, 283 N.E.2d 532 (1972); *Burns v. State*, 255 Ind. 1, 260 N.E.2d 559 (1970)).

¹⁴⁶*Id.* at 1043 (citing *Thonert v. Daenell*, 148 Ind. App. 70, 263 N.E.2d 749 (1970)).

¹⁴⁷*Id.* (citing *City of Indianapolis v. Heeter*, 355 N.E.2d 429 (Ind. Ct. App. 1976); *Schmidt Enterprises, Inc. v. State*, 354 N.E.2d 247 (Ind. Ct. App. 1976); *Weenig v. Wood*, 349 N.E.2d 235 (Ind. Ct. App. 1976)).

judice by the trial court's decision and do so under the appropriate standard of review in the given case.¹⁴⁸

V. Constitutional Law

*Jeffrey W. Grove**

A. Indiana Guest Statute Cases

In what one commentator has characterized as the "second wave"¹ of equal protection attacks on automobile guest statutes, which typically provide that an automobile guest cannot recover damages against the host driver for injury caused by the host's ordinary negligence, the statutes of eight states have been declared unconstitutional² while those of eleven states have been upheld.³ Indiana's guest statute is the most recent survivor. It provides:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless

¹⁴⁸*Id.* (citing *Wells v. Gibson Coal Co.*, 352 N.E.2d 838 (Ind. Ct. App. 1976)).

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¹Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U.CHI.L.REV. 798, 799 (1976). "In the first set of challenges, arising soon after the first statutes were enacted, acts with typical provisions were uniformly upheld. The leading case of the series was *Silver v. Silver* [280 U.S. 117 (1929)] in which the Supreme Court upheld the Connecticut guest statute" *Id.* at 799 (footnotes omitted).

²*Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212 (1973); *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974); *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 232 N.W.2d 636 (1975); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975); *Laakonen v. Eighth Judicial Dist. Court*, 91 Nev. 506, 538 P.2d 574 (1975); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

³*Sidle v. Majors*, 536 F.2d 1156 (7th Cir. 1976) (upholding Indiana's statute); *Beasley v. Bozeman*, 294 Ala. 288, 315 So. 2d 570 (1975); *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70 (1975); *Richardson v. Hansen*, 186 Colo. 346, 527 P.2d 536 (1974); *Justice v. Gatchell*, 325 A.2d 97 (Del. 1974); *Keasling v. Thompson*, 217 N.W.2d 687 (Iowa 1974); *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975); *Behrns v. Burke*, 229 N.W.2d 86 (S.D. 1975); *Duerst v. Limbocker*, 269 Ore. 252, 525 P.2d 99 (1974); *Cannon v. Oviatt*, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974); *Tisko v. Harrison*, 500 S.W.2d 565 (Tex. Ct. App. 1973).

such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.⁴

In *Sidle v. Majors*,⁵ a diversity case brought in the United States District Court for the Southern District of Indiana, plaintiff charged the host driver with ordinary negligence as well as wanton or willful misconduct in causing her injury while she was riding as a guest in the automobile. The district court entered summary judgment for defendant on the ordinary negligence Count, holding that Indiana's guest statute barred recovery. Although Count II, alleging defendant's wanton or willful misconduct, was not tried, plaintiff's appeal from the summary judgment followed upon the district court's entry of judgment on Count I pursuant to Federal Rule of Civil Procedure 54(b).⁶ Both at the trial level and on appeal, plaintiff challenged the constitutionality of the guest statute under the Indiana and United States Constitutions. Because the Indiana Supreme Court had not passed on the state constitutional questions, the United States Court of Appeals for the Seventh Circuit certified those questions to that court.⁷

Rejecting the proposition that "the right to bring an action for common law negligence is 'fundamental' and that the burden is therefore upon the proponent of constitutionality to show a compelling state interest justifying the legislative classification,"⁸ the Indiana Supreme Court identified the issue as whether the statutory classification of automobile passengers—guests and non-guests—"is reasonable and bears a fair and substantial relation to the legitimate

⁴IND. CODE § 9-3-3-1 (1976).

⁵536 F.2d 1156 (7th Cir. 1976).

⁶FED. R. CIV. P. 54(b) provides:

When more than one claim for relief is presented . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

⁷See IND. R. APP. P. 15(O) (formerly IND. R. APP. P. 15(N)), which provides: When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

⁸*Sidle v. Majors*, 341 N.E.2d 763, 766 (Ind. 1976).

purpose of the statute."⁹ Although the text of Indiana's guest statute contains no expression of the purpose for which it was enacted, and while its enactment was accompanied by no legislative history, the court speculated that the purposes traditionally underlying guests statutes are also attributable to the Indiana statute. Those purposes are "the fostering of hospitality by insulating generous drivers from law suits instituted by ungrateful guests and the elimination of possibility of collusive law suits."¹⁰ Each of these purposes was found to bear a reasonable relationship to the statutory classification.

The court acknowledged that the generosity of a driver toward his guest might well transcend the providing of free transportation; it might even extend to the exercise of "greater care for the safety of his guests than . . . for his own."¹¹ But this "utopian" inclination to exercise "greater care" is not one "that the guest should have a right to demand"¹² or rely upon. Indeed, the guest should have no right to insist that the host exercise even an ordinary degree of care. In what is obviously a rhetorical question, the court asked: "Is it unreasonable to expect [the guest] either to cast his lot with his host or to decline to accept the hospitality?"¹³ In short, the generous instincts of the host should not induce a dilated sense of reliance by the guest and should in no way obscure the fair and substantial relationship between the purpose of discouraging ingratitude and the statute's limitation of liability to conduct that is wanton or willful.

However, if the statutory purpose is described in the affirmative—the "fostering of hospitality"—and if it is true that hospitable hosts may wish, in any case, to exercise a high level of care for the safety of their guests, the purpose hardly seems reasonably related to the operation of the guest statute, which exacts only a minimal standard of care. Therefore, implicit in the court's analysis is the assumption that the hospitable and generous proclivities of hosts would soon be tempered by the greater likelihood of liability that would exist in the absence of statutory insulation.

⁹*Id.* at 767.

Indiana's equal protection provision is set forth in IND. CONST. art. 1, § 23: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Within the context of *Sidle* and its companion case, the Indiana Supreme Court detected "no differences in the equal protection provisions of the state and federal constitutions [U.S. CONST. amend. XIV, § 1]." 341 N.E.2d at 767.

¹⁰341 N.E.2d at 768.

¹¹*Id.* at 769.

¹²*Id.*

¹³*Id.*

In his opinion for the court, Justice Prentice addressed the argument that the availability of liability insurance has largely undercut any notion of "ingratitude." However, that argument was not regarded as persuasive, for in the court's view it fails to take into account several factors: First, such insurance is purchased for the host's protection and not for the benefit of a guest; second, a guest's claim might exceed the liability limits of the host's insurance policy; and finally, even where the claim would not expose the host to liability beyond that provided for in his policy of insurance, "substantial detriments accrue to one who finds himself the defendant in a tort action, not the least of which is the possibility of a cancellation of his insurance or a substantial increase in his premiums."¹⁴

As to the purpose of eliminating "collusion," the court acknowledged that no statute can offer complete protection against perjury. Thus, while the guest statute's requirement that a guest plead and prove wanton or willful misconduct will deter perjury on the negligence issue, it may not prevent perjury on the question whether the guest was a passenger being transported "without payment." Nonetheless, the court concluded:

We think it no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively. We do not agree with the California Court [in *Brown v. Merlo*¹⁵] that the classifications are so over-inclusive as to defy notions of fairness or reasonableness.¹⁶

The Indiana Supreme Court perceived an additional legislative purpose underlying the Indiana guest statute "which, for want of a better designation, could be called protection against the 'benevolent thumb syndrome.'"¹⁷ This was described as a legislative attempt to protect liability insurance companies "from the human propensity of juries to weigh their 'benevolent thumb' along with the evidence of the defendant's negligence,"¹⁸ and concomitantly, to protect the general driving public against the increased insurance premiums presumably occasioned by such "benevolence."

The Seventh Circuit Court of Appeals flatly rejected the conclusions reached by the Indiana Supreme Court in that court's equal protection analysis of the guest statute. Relying heavily upon the

¹⁴*Id.*

¹⁵8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

¹⁶341 N.E.2d at 770.

¹⁷*Id.* at 771.

¹⁸*Id.* at 772.

opinion by the California Supreme Court in *Brown v. Merlo*,¹⁹ the Seventh Circuit found that "widespread liability insurance has eliminated any notion of ingratititude,"²⁰ that the presence or absence of guest statute legislation has no demonstrated bearing on the cost of liability insurance premiums,²¹ and that "it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent lawsuits."²² Nevertheless, the Indiana guest statute was not invalidated, for the court believed itself precedentially bound by the action of the United States Supreme Court in *Cannon v. Oviatt*.²³ In *Cannon*, the Supreme Court of Utah had upheld the constitutionality of a guest statute virtually identical to the Indiana statute.²⁴ On appeal, the United States Supreme Court was presented with the question of whether that statute violated the equal protection clause because it barred recovery for ordinary negligence. The Court dismissed the appeal "for want of a substantial federal question."²⁵ Subsequently, in *Hicks v. Miranda*,²⁶ the Court ruled that such a disposition operates as an adjudication on the merits.

The Seventh Circuit's reliance upon the Supreme Court's disposition in *Cannon* as the basis for allowing Indiana's guest statute to stand, despite its own inclination to invalidate the statute, was inescapably correct. *Hicks* plainly teaches that the lower courts are bound by summary decisions of the Supreme Court.²⁷ It seems unwise, however, for the United States Supreme Court to insist that its summary dispositions be accorded the same conclusive precedential effect as its dispositions by opinions, which follow full briefing and oral argument. Indeed, in *Edelman v. Jordan*,²⁸ decided only one year before *Hicks*, the Supreme Court stated that summary dispositions "are not of the same precedential value as would be an opinion

¹⁹8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

²⁰536 F.2d at 1157.

²¹Specifically, the court stated:

[W]hen the Guest Act was enacted in Connecticut in 1927, there was no reduction in automobile premiums, nor was there an increase in the premiums when that statute was repealed ten years later. Note, 42 U. Cinn. L. Rev. 709, 721 (1973). Defendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance.

Id. at 1158 (footnote omitted).

²²*Id.*

²³419 U.S. 810 (1974).

²⁴520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974).

²⁵419 U.S. at 810.

²⁶422 U.S. 332 (1975).

²⁷*Id.* at 344-45.

²⁸415 U.S. 651 (1974).

of this Court treating the question on the merits."²⁹ This earlier characterization of the relative weight to be accorded summary dispositions seems preferable on several counts. Most importantly, summary dispositions, unlike dispositions following plenary consideration by the Court, are based on limited presentations by the parties, amounting simply to jurisdictional statements and motions to affirm or dismiss that are addressed to those statements. Hence, the Court enjoys relatively less assistance in making an informed and searching examination of the constitutional questions raised in the appeal. In addition, summary dispositions are rarely accompanied by statements of reasons or authority upon which the dispositions rest. Unfortunately, such unexplained dispositions create difficulties for the lower federal courts in knowing just what the Supreme Court intended.³⁰

Apart from the Seventh Circuit's necessary reliance on the Supreme Court's summary disposition in *Cannon*, its analysis of the merits of the equal protection issues raised by Indiana's guest statute is less than convincing. The California Supreme Court's opinion in *Brown v. Merlo*, upon which the Seventh Circuit relied so heavily, is a well constructed opinion and, within its framework, makes a strong case for the proposition that guest statute legislation violates the equal protection clause. Unfortunately, that opinion does not deal effectively with what is perhaps the most powerful argument favoring the constitutionality, on equal protection grounds, of guest statutes. Indeed, the Indiana Supreme Court's decision in *Sidle v. Majors* takes little notice of the argument, and only Justice Arterburn, in his concurring opinion, identifies it:

[T]he common law imposed upon a warehouseman or carrier of freight for pay a higher standard of care than that imposed upon one storing property for no payment for a friend or neighbor. The legislature has the right to enact the same principle with reference to gratuitous operators of automobiles with guests and those who are paid for the transportation of passengers. If at common law the courts saw fit to impose different degrees of negligence and care with reference to gratuitous acts as compared with those for pay, then certainly the legislature constitutionally may do so.³¹

²⁹*Id.* at 671.

³⁰An excellent discussion of these and related concerns is contained in Mr. Justice Brennan's opinion dissenting from the denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913 (1976).

³¹341 N.E.2d at 776 (Arterburn, J., concurring).

A more detailed and scholarly treatment of this argument is contained in an unusually perceptive law review commentary in which the author concludes:

Given its historical background, the doctrine of degrees of care can scarcely be "arbitrary"; it seems unlikely that it could be "essentially unreasonable." Indeed, to some extent at least, the doctrine still reflects what natural justice would seem to require. The guest statutes embody this common law doctrine; and they are no more susceptible than the doctrine itself to a generalized charge of irrationality.³²

Stated otherwise, guest statutes may be regarded as codifying, in a specific category of cases, the common law doctrine of degrees of care, which was based on the nature of the relationship between the parties. To the extent the purpose of such statutes is to recognize and legislate a minimal standard of care based upon the gratuitous nature of a host-guest relationship, the reasonableness or rationality of the connection between this time-honored policy and the legislative classification seems clear.

In addition to the equal protection challenge to Indiana's guest statute, two other state constitutional provisions were the bases for attacks on the statute. In *Sidle v. Majors*, plaintiff also contended that the legislature's circumscription of the common law action for ordinary negligence constituted a deprivation of due process of law under Indiana's basic charter.³³ This argument is essentially specious, for the concept of due process, however flexible it may be, hardly establishes vested interests in common law standards of conduct or sanctifies those standards as immutable. Rejecting plaintiff's contention, the Indiana Supreme Court observed:

That our Constitution was not intended to render the common law static is made clear to us by its schedule which expressly provides for changes in the following language: "Laws continued—First. All laws now in force, and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed."³⁴

³²Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U. CHI. L. REV. 798, 817-18 (1976).

³³IND. CONST. art. 1, § 12:

All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

³⁴341 N.E.2d at 774 (emphasis added).

An equally insubstantial constitutional issue was presented to the Indiana Court of Appeals in *Cook v. Mercury Lumber Co.*³⁵ Plaintiff-administrator alleged that defendant, whose employee was the driver of an automobile in which plaintiff's decedent was a guest passenger, was liable to the estate for the death of decedent caused by the negligent operation of the vehicle. The trial court dismissed this Count as a result of plaintiff's failure to allege that the employee's misconduct was "wanton or willful." Plaintiff asserted that the guest statute violates the right to trial by jury in all civil cases as preserved by Indiana's Constitution.³⁶ But the guest statute simply does not eliminate the right to a jury trial. Rather, "the legislature changed the standard which the court or jury is to apply in determining liability in guest cases,"³⁷ a constitutional license that was recognized in *Sidle v. Majors*.³⁸

B. Indiana Abortion Law Cases

During the period encompassed by this survey, three separate provisions of Indiana's abortion statute came under constitutional attack. One of these provisions, which was the state's original abortion statute enacted in 1905, imposes criminal liability on "whoever" procures an abortion "unless such miscarriage is necessary to preserve [the pregnant woman's] life."³⁹ In *Rhim v. State*,⁴⁰ defendant, a non-physician, was convicted as an accessory to this crime. Defendant argued that this provision is unconstitutional in light of the decision by the United States Supreme Court in *Roe v. Wade*,⁴¹ which invalidated a similar provision.

Relying upon its holding in *Cheaney v. State*⁴² that a nonphysician convicted of attempting to perform an abortion has standing to raise the constitutionality vel non of the abortion statute, the In-

³⁵359 N.E.2d 600 (Ind. Ct. App. 1977).

³⁶IND. CONST. art. 1, § 20.

³⁷359 N.E.2d at 601.

³⁸See note 34 *supra* and accompanying text.

³⁹IND. CODE § 35-1-58-1 (1976). The full text of the provision reads:

Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman, or with like intent, uses or suggests, directs or advises the use of any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, on conviction, if the woman miscarries, or dies in consequences thereof, be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned in the state prison not less than three years nor more than fourteen years.

⁴⁰348 N.E.2d 620 (Ind. 1976).

⁴¹410 U.S. 113 (1973).

⁴²285 N.E.2d 265 (Ind. 1972), *cert. denied*, 410 U.S. 991 (1973).

diana Supreme Court experienced little difficulty in upholding the challenged provision under the facts of *Rhim*. The court noted that the Connecticut Supreme Court had earlier overturned the conviction of a nonphysician abortionist⁴³ on the authority of *Roe v. Wade*, but that the United States Supreme Court granted certiorari and vacated that judgment,⁴⁴ stating that in *Roe*, the Court "did not hold the Texas statutes unenforceable against a nonphysician abortionist," and that "the rationale of our decision supports continued enforceability of criminal abortion statutes against nonphysicians."⁴⁵ The Indiana Supreme Court concluded:

Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference. And after the first trimester the ever increasing state interest in maternal health provides additional justification for such prosecutions.⁴⁶

While this result is manifestly sound, the court's statement that such prosecutions "infringe upon no realm of personal privacy" seems unnecessarily broad. The teaching of *Roe v. Wade* is "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important State interests in regulation";⁴⁷ those interests are "in preserving and protecting the health of the pregnant woman . . . and . . . in protecting the potentiality of human life."⁴⁸ What is contemplated by this language, as well as by the result in the case, is a balancing of the state's interests against the right of personal privacy. Therefore, it would have been preferable for the Indiana Supreme Court to say that the mother's right to privacy is *outweighed* by the state's legitimate interest in preserving maternal health by prohibiting abortions performed by nonphysicians.

A more recently enacted provision of Indiana's abortion statute requires that "[d]uring the first trimester of pregnancy" any abortion be performed "in a hospital, or a licensed health facility."⁴⁹ In

⁴³State v. Menillo, 168 Conn. 266, 362 A.2d 962, *vacated*, 423 U.S. 9 (1975).

⁴⁴Connecticut v. Menillo, 423 U.S. 9 (1975).

⁴⁵*Id.* at 10.

⁴⁶348 N.E.2d at 622.

⁴⁷410 U.S. at 154.

⁴⁸*Id.* at 162.

⁴⁹IND. CODE § 35-1-58.5-2 (1976):

Abortion shall in all instances be a criminal act except when performed under the following circumstances:

Arnold v. Sendak,⁵⁰ plaintiff-physicians insisted that this requirement directly conflicts with the United States Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*.⁵¹ The federal district court agreed that the Supreme Court has expressly denied to the states the right to regulate the type of facility in which an abortion is to be performed during the first trimester of pregnancy. In *Roe*, the Court cautioned that state regulation "as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status," is appropriate only after the "compelling" point, which "is at approximately the end of the first trimester."⁵² And in *Doe*, the Court specifically invalidated a provision of the Georgia abortion statute on the ground that its "hospital requirement . . . fails to exclude the first trimester of pregnancy."⁵³

Finally, a separate but closely related provision of Indiana's abortion statute requires the consent of a parent or person in loco parentis as a condition for aborting an unmarried minor during the first twelve weeks of her pregnancy, unless the abortion is necessary to preserve the mother's life.⁵⁴ In *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*,⁵⁵ plaintiffs challenged this provision in a federal class action. As the district court found, the issue of parental consent was recently decided by the United States Supreme Court in *Planned Parenthood v. Danforth*.⁵⁶ The statute under attack in *Danforth* required the consent of a parent as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy. The Court there stated:

[T]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

(a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

(1) It is performed by such physician in a hospital or a licensed health facility as defined in IC 1971, 16-10-2 which offers the basic safeguards as provided by a hospital admission, and has immediate hospital backup

⁵⁰416 F. Supp. 22 (S.D. Ind. 1976).

⁵¹410 U.S. 179 (1973).

⁵²*Id.* at 163.

⁵³*Id.* at 195.

⁵⁴IND. CODE § 35-1-58.5-2(a)(2) (1976).

⁵⁵421 F. Supp. 734 (N.D. Ind. 1976).

⁵⁶428 U.S. 52 (1976).

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.⁶⁷

Hence, the district court invalidated the Indiana provision and permanently enjoined its enforcement.

C. Other Equal Protection/Due Process Cases

1. *Indiana Decisions.*—Indiana's Tort Claims Act⁶⁸ provides that a claim against a political subdivision of the state is barred unless notice of the claim is served on the governing body within 180 days after the loss occurs.⁶⁹ The predecessor statute called for such notice within 60 days after the loss.⁷⁰ Two years ago in *Bat-chelder v. Haxby*,⁷¹ the Indiana Court of Appeals, in a 2-1 decision, held that the 60-day notice requirement of the predecessor statute did not deny the victim of a governmental tort equal protection of the laws. The court found that "[g]overnmental units are different from private tortfeasors" and was "unable to say the classification does not rest upon any reasonable basis."⁷²

During the current survey period, in *City of Fort Wayne v. Cameron*,⁷³ the 60-day notice requirement was again the subject of constitutional inquiry, this time on due process grounds. The claim arose when the plaintiff was shot by a city policeman and paralyzed from the neck down. Nine months later he attained the age of majority. Shortly thereafter, and while still hospitalized as a result of the shooting, he served notice of his claim. The defendant-city moved for summary judgment and submitted an affidavit averring that notice of plaintiff's claim had not been received within 60 days of the incident. The trial court denied the motion on the theory that Indiana's separate disability statute,⁷⁴ when read with the notice requirement, excused compliance during the period of plaintiff's minority. The appellate court rejected this theory, holding that the disability statute applies only to time limits contained in statutes of limitation and is "inapposite" to the notice requirement, which is

⁶⁷*Id.* at 74.

⁶⁸IND. CODE § 34-4-16.5-1 to -18 (1976).

⁶⁹*Id.* § 34-4-16.5-7.

⁷⁰Ch. 16, § 1, 1967 Ind. Acts 21 (repealed 1974).

⁷¹337 N.E.2d 887 (Ind. Ct. App. 1975).

⁷²*Id.* at 889-90.

⁷³349 N.E.2d 795 (Ind. Ct. App. 1976).

⁷⁴IND. CODE § 34-1-2-5 (1976): "Any person, being under legal disabilities when the cause of action accrues, may bring his action within two [2] years after the disability is removed."

simply "a procedural precedent to the remedy of maintaining a civil action against the city."⁶⁵

The court of appeals then addressed the due process issues. Recognizing that every statute carries with it a presumption of constitutionality and emphasizing the self-restraint which the judiciary should exercise when reviewing the constitutionality of legislation, the majority observed that "[w]here the statute deals merely with a remedy, our courts have been loathe to find an issue in due process unless there exists but a single remedy and the legislature withdraws all legal means of enforcement."⁶⁶ Measuring the plaintiff's claim by this standard, the majority found that all legal means of enforcing the remedy were not withdrawn by the notice requirement, which was not "so short and unreasonable as to effectively deprive would-be litigants of any right of action against municipalities."⁶⁷ Thus, the requirement, on its face, did not constitute a deprivation of due process. Nor, in the court's view, was the notice provision unconstitutional as applied to plaintiff within the facts of this case. Noting that the statute did not require notice to be given by the plaintiff personally, the court found that plaintiff was not so incapacitated that he was incapable of "indicating his belief that he had a claim"⁶⁸ or of directing another to serve notice of his claim on the city within the prescribed time. The matter of plaintiff's minority during the running of the notice period was not dealt with directly. However, the present Tort Claims Act allows notice to be served within 180 days "after the incompetency is removed."⁶⁹

While the constitutional standard invoked in this case seems appropriate, the decision is questionable on its facts. As pointed out by Judge Staton in a vigorous dissent, the appeal arose within the context of a motion for summary judgment in which the city, as the moving party, had the burden of demonstrating the absence of any genuine issue of material fact. Any doubt as to the existence of such an issue must be resolved against the moving party. Because the plaintiff here was paralyzed and hospitalized for more than nine months before he served notice of his claim (indeed, his hospitalization continued even after notice was served, and partial paralysis has persisted), plaintiff's ability—or lack thereof—to cause notice to be served within the statutory period would appear to constitute a

⁶⁵349 N.E.2d at 798.

⁶⁶*Id.* at 799.

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹IND. CODE § 34-4-16.5-8 (1976). It is unclear whether the term "incompetency" would include the kind of physical disability portrayed in *Cameron*.

genuine issue of fact. For this reason, summary disposition was inappropriate. Moreover, if plaintiff's incapacitation rendered him incapable of causing notice to be served, plaintiff's due process rights were impinged under the very standard adopted by the majority: Refusal to excuse compliance under such circumstances would amount to withdrawal of all means of enforcing the remedy as a result of the statute's application. As Judge Staton reasoned, to bar an injured party's claim under such circumstances would be "equivalent to telling the municipalities that, if they are negligent on any occasion, their negligence should be sufficiently gross to insure the complete mental and physical disability of the victim."⁷⁰

The power of a prosecuting attorney to originate and conduct an Alcohol Deferred Prosecution Program was challenged in *Brune v. Marshall*.⁷¹ Under the Program in question, a person arrested for operating a motor vehicle under the influence of alcohol could avoid being charged and prosecuted for the offense by submitting to the rehabilitative measures of the Program and tendering a fifty-dollar fee. The plaintiff here paid a part of the fee and was placed in the Program, only to be removed from it following his violation of certain conditions attendant upon participation. He sued the prosecutor for return of the partial fee paid for admission to the Program. The trial court held the Program to be unconstitutional and rendered a judgment for the plaintiff. The Indiana Court of Appeals agreed that the Program raised due process issues:

The prosecutor's program may also be constitutionally attacked on a basis of the violation of the arrested individual's Federal due process rights. This may be especially true in light of the possible coercive nature of the choice presented to the subject. The accused faces a choice of "volunteering" for the program and suffering a limited loss of personal freedom; or in the alternative, pleading not guilty and running the risk of a more severe penalty. This possible loss of effective choice, coupled with the program's required waiving of due process rights, presents serious constitutional questions.⁷²

However, the court did not decide these questions, preferring instead to hold the Program unlawful because the prosecuting attorney had exceeded his statutory authority in instituting and implementing the Program. A similar program currently in operation

⁷⁰349 N.E.2d at 807 (Staton, J., dissenting).

⁷¹350 N.E.2d 661 (Ind. Ct. App. 1976).

⁷²*Id.* at 663.

in Marion County is authorized by a statute that appears to avoid the constitutional concerns expressed in *Brune*.⁷³

The use of separate actuarial tables for male and female retired teachers in computing benefits to be paid from the State Teachers' Retirement Fund was struck down on equal protection grounds in a 3-2 decision by the Indiana Supreme Court in *Reilly v. Robertson*.⁷⁴ The Fund involves a pension portion, contributions to which are made by the state, and an annuity portion, paid for by participating teachers.⁷⁵ It is administered by its board of trustees.⁷⁶ Prior to 1972, monthly payments from the annuity portion of the fund were calculated on the basis of a mortality table that did not classify the recipient teachers by sex. Beginning in 1972, however, recognizing that the average life expectancy of women as a group had been historically greater than that of men, the board adopted sex-differentiated actuarial tables, which resulted in female retirees receiving less money per month than male retirees.

In applying the equal protection provisions of the Indiana and Federal Constitutions, the court purported to utilize a low-scrutiny review of the classification, requiring only that it bear a fair and substantial relationship to the purpose for which the Fund was created. Although it was recognized that the United States Supreme Court appears to have invoked an intermediate level of scrutiny in equal protection analyses of sex-based classifications,⁷⁷ the Indiana Supreme Court found it unnecessary to discuss the application of heightened levels of scrutiny in view of the result reached under the traditional equal protection test. The Fund's board of trustees maintained that the classification resulting from its adoption of separate mortality tables was intended to serve two purposes of the teachers' retirement legislation: to insure the financial integrity of the Fund, and to offer an incentive for teachers to remain in the teaching profession—an incentive that would be diluted for male teachers if they were required, by virtue of their shorter life expectancy, to subsidize female retirees by providing some of the monies used to pay annuity benefits to retired female teachers. The supreme court, however, was not persuaded that the effect of the classification was to promote the security of the Fund, especially since no showing had been made "that the failure of the Board to consider the sex of an

⁷³IND. CODE § 16-13-6.1-1 to -34 (1976). The Program is administered by the judges of a court of competent jurisdiction, *id.* § 16-13-6.1-30, and provides a sentencing alternative, *id.* § 16-13-6.1-15, rather than an alternative to prosecution.

⁷⁴360 N.E.2d 171 (Ind. 1977).

⁷⁵IND. CODE § 21-6-1-10 (1976).

⁷⁶*Id.* § 21-6-1-3.

⁷⁷See 360 N.E.2d at 175 n.1 (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

nuitants in computing their annuity portions prior to 1972 placed the solvency of the Fund in jeopardy to any degree."⁷⁸ Moreover, although the court acknowledged that "the purpose served by treating men and women differently [here such purpose being the avoidance of this subsidization effect] 'is not without some legitimacy,'"⁷⁹ the possibility that "subsidization" by male teachers would dissuade them from remaining in the profession was characterized as "speculative and remote."⁸⁰ Finally, the court emphasized that the legislative purpose of encouraging teachers to remain in the profession is accomplished by providing periodic satisfaction of short-term needs arising during retirement, and no difference in those needs as between men and women was found to exist.

Central to any equal protection analysis is judicial discernment of the statutory purpose to which the challenged classification arguably relates. How the purpose is to be divined in the absence, as here, of any real legislative guidance remains a mystery of the judicial process. Still, even accepting the purpose so baldly (though not implausibly) stated by the majority—"to provide an incentive to all teachers to remain in teaching as a lifetime career"⁸¹—surely the purpose may not be effected at the expense of a defined class of annuitants. Indeed, implicit in the "overall" purpose must be an intent that it operate fairly. If in the absence of sex-differentiated mortality tables male teachers do "subsidize" female retirees, such sex-based inequality should not be sanctioned. Chief Judge Givan's dissenting opinion, though not generally responsive to the majority's analysis, spoke to this inequality:

There were two avenues to pursue which would have resulted in equal treatment. One was to charge the men a smaller premium during their period of actual service, and upon retirement give equal payment to men and women. The other was to charge an equal premium regardless of sex, but upon retirement to pay a smaller monthly amount to the women retirees. The Board obviously chose the latter.⁸²

In addition, the majority acknowledged that the purpose of avoiding "subsidization" (and, presumably, of avoiding any disincentive thus occasioned) had "some legitimacy"; it concluded, however, that the classification was not sufficiently related to this purpose.

⁷⁸360 N.E.2d at 176.

⁷⁹*Id.* at 177 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

⁸⁰*Id.*

⁸¹*Id.* at 176.

⁸²*Id.* at 180 (Givan, C.J., dissenting).

since male teachers would discount the subsidization effect in deciding whether or not to remain in the teaching profession. Significantly, however, the majority failed to find that such subsidization does not occur (although it was at pains to minimize the importance and impact of this factor). And surely it is neither arbitrary nor irrational to conclude that a classification that would eliminate this factor would also serve as an inducement for male teachers to remain in the profession, if they were satisfied that the annuity plan did not discriminate against them financially. This is not to say, of course, that the classification would have this effect in the case of all male teachers. Indeed, it is not clear that the annuity plan itself encourages all teachers to decline alternative employment. But the classification resulting from the use of separate mortality tables should withstand a low-scrutiny equal protection analysis, which demands only that the nexus between the classification and the legislative purpose be rational—not that the classification be “necessary” to promote a “compelling” interest. Perhaps the classification could not withstand a heightened level of scrutiny; in fact, perhaps this explains the result in this case. It seems obvious that the majority did indeed apply a higher level of scrutiny than it purported to apply under the traditional equal protection test.

This was, to be sure, a difficult case, and Judge Arterburn's concurring opinion is therefore appealing in its simplicity. He agreed with the result on the ground that “no statistical evidence or mortality table presented . . . shows that in the teaching profession females have a longer life span than males.”⁸³ Thus, the classification based on this fundamental and unsupported assumption was, in his view, invalid.

Issues of procedural due process were presented to the Indiana Court of Appeals in *State v. Elliott*.⁸⁴ The defendant in this criminal action posted a \$2,000 bond and then failed to appear for a hearing on defense counsel's motion to withdraw his appearance. When the bondsmen did not thereafter produce the defendant at the place and time designated by the court, the bond was declared forfeited. After more than 180 days had elapsed, the state filed a motion for judgment on the bond forfeiture pursuant to the applicable Indiana statute.⁸⁵ The state's motion was summarily granted and the money was paid to the state treasurer. Subsequently, the trial court granted the bondsman's Petition to Rescind Judgment and ordered the state treasurer to return the \$2,000. The court of appeals reversed. It noted that Indiana's constitution establishes a Common School

⁸³ *Id.* at 181 (Arterburn, J., concurring).

⁸⁴ 357 N.E.2d 276 (Ind. Ct. App. 1976).

⁸⁵ IND. CODE § 34-4-5-12 (1976).

Fund consisting, in part, of "all forfeitures which may accrue."⁸⁶ The principal of the Fund "may be increased, but shall never be diminished."⁸⁷ Thus, when a forfeiture "accrues" to the Fund, "it becomes part of the principal of such fund and may not thereafter be remitted."⁸⁸ The court held that the forfeiture accrued "[w]hen such payment was in [the] possession of the Treasurer of the State."⁸⁹ The trial court had therefore erred in ordering the money disgorged.

The bondsman contended, however, that the forfeiture statute is unconstitutionally vague and also denies due process of law by authorizing a judgment of forfeiture to be entered without actual notice to the bondsman, without a hearing, and without pleadings. The statute provides:

In case the defendant shall not appear as provided in the bond, the court shall thereupon declare the bond forfeited and the clerk shall mail notice of such forfeiture to the addresses indicated in the bonds, and if the bondsmen do not produce the defendant or prove that the appearance of the defendant was prevented by illness, or by the death of a defendant, or the trial defendant was being held in custody of the United States, a state or a political subdivision thereof, or if required notice was not given within one-hundred eighty [180] days after such mailing and pay all costs and satisfy the court that defendant's absence was not with the consent or connivance of the sureties, the court shall at once enter judgment, without pleadings⁹⁰

In describing certain of the procedures by which a surety may avoid a judgment of forfeiture, this statute is simply incomprehensible.

⁸⁶IND. CONST. art. 8, § 2.

⁸⁷*Id.* art. 8, § 3.

⁸⁸357 N.E.2d at 278.

⁸⁹*Id.* at 279. On this score, Judge Staton dissented:

The prohibition against diminishing the principal goes only to those funds which have properly accrued and constitute the principal. It does not apply to funds which have been mistakenly forfeited and included in the principal. The intent of Article 8, § 3 is not to foreclose a withdrawal of funds from the principal, which never should have been included in the principal. Here, the same judicial determination of forfeiture was rescinded by a second judicial determination. Whether the fund is a part of the principal of the common school fund depends upon the judicial determination of its character as a forfeiture. The judgment which rescinded the previous judgment of forfeiture nullifies the characterization of the fund, and therefore, it is no longer a part of the principal of the common school fund.

Id. at 280 (Staton, J., dissenting).

⁹⁰IND. CODE § 35-4-5-12 (1976).

The appellate court found, however, that the statute, when read with a related provision that prescribes the form for recognizances for appearances of prisoners,⁹¹ does provide fair notice of these procedures. "Such form clearly states that the judgment of forfeiture will be entered if the surety fails to produce the defendant within 180 days after mailing of notice of forfeiture."⁹² The surety's vagueness argument was therefore rejected. Moreover, that a judgment of forfeiture shall be entered "without pleadings" was not viewed as repugnant to principles of due process:

The bondsmen is afforded the opportunity to be heard during the 180-day period. During such period the bondsman may produce the defendant or assert any other available defenses. Due process does not require that the defendant in every instance actually have a hearing on the merits, but only that he be granted an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.⁹³

Finally, because the bondsman in this case did not allege that the notice called for in the statute was not actually received, the court did not address the argument that the statutory notice requirement is invalid.

2. *Federal Decisions.*—The procedural due process guarantees available to prisoners who are transferred from a state reformatory to a state prison for disciplinary confinement or segregation were refined during the survey period in *Aikens v. Lash*.⁹⁴ At an earlier stage in this case, the United States Court of Appeals for the Seventh Circuit had held that minimum procedural safeguards must be provided in such situations.⁹⁵ Specifically, the court required that the prisoner be given notice of the charges against him; that he be allowed a disciplinary transfer hearing; and that an illiterate inmate, or one faced with issues so complex that he is unable to collect and present evidence, be afforded lay counsel in preparing his case. The court further held that although prison officials have the discretion to deny an inmate the opportunity to cross-examine witnesses against him,⁹⁶ that power may not be exercised arbitrarily or capriciously. In the court's view, the exercise of such discretion could not be subjected to informed judicial scrutiny unless a refusal

⁹¹*Id.* § 35-4-5-10.

⁹²357 N.E.2d at 279.

⁹³*Id.*

⁹⁴547 F.2d 372 (7th Cir. 1976).

⁹⁵*Aikens v. Lash*, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976).

⁹⁶See *Wolff v. McDonnell*, 418 U.S. 539 (1974).

to allow cross-examination, when requested, is accompanied by a written record of the reasons for the refusal.

Following this earlier disposition by the Seventh Circuit, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case⁹⁷ for consideration in light of its intervening decision in *Baxter v. Palmigiano*.⁹⁸ In *Baxter*, the Court stated that "[m]andating confrontation and cross-examination, except where prison officials can justify their denial . . . , effectively preempts the area . . . left to the sound discretion of prison officials."⁹⁹ Hence, on remand the Seventh Circuit concluded, on the authority of *Baxter*, that the prison officials were not required to give written reasons for refusing to allow cross-examination at plaintiff's disciplinary transfer hearing.

Different questions relating to the rights of inmates in state prisons were explored by the Seventh Circuit in *In re Warden of Wisconsin State Prison*.¹⁰⁰ The specific issue presented to the court was whether principles of due process entitle an inmate in a state prison to be present at the trial of a civil action unrelated to the terms of his confinement and brought by the prisoner in federal court. While the court acknowledged the fundamental interest of a prisoner in access to the courts, it declined to accord this interest the status of an automatic right. Instead, a balancing test was deemed appropriate: The prisoner's interest should be weighed against "the interest of the state in maintaining the confinement of persons serving sentences at the place and institution chosen by the state, in avoiding risks of escape, and in economical administration of custody."¹⁰¹ Some considerations relevant to this balancing were suggested by the court,¹⁰² but how the balance should be struck in the instant case was left undecided as a result of the court's disposition of the appeal on equal protection grounds.

It was disclosed at oral argument that the warden was willing,

⁹⁷*Lash v. Aikens*, 425 U.S. 947 (1976).

⁹⁸425 U.S. 308 (1976).

⁹⁹*Id.* at 322 (footnote omitted).

¹⁰⁰541 F.2d 177 (7th Cir. 1976).

¹⁰¹*Id.* at 180.

¹⁰²Specifically, the court of appeals commented:

Some of the relevant considerations would seem to be: How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner represented? If not, is his presence reasonably necessary to present his case?

under the terms of a Wisconsin state statute,¹⁰³ to transport an inmate to a state court if the state judge decided that his presence was necessary. A prisoner who institutes his civil action in a state court is thus afforded better treatment than one who files the action in federal court. This classification was denounced as a denial of equal protection because it is "not rationally related to a legitimate interest of state government."¹⁰⁴ The case was remanded to the district court to determine whether the prisoner's "presence at trial is reasonably necessary."¹⁰⁵ The Seventh Circuit failed to indicate, however, whether the question of reasonable necessity should be answered by application of the balancing test it suggested, or with reference to considerations employed by Wisconsin state judges pursuant to state law. The latter approach would satisfy the court's equal protection objections, but would not preclude the prisoner's federal due process objections if the state law considerations were not sufficiently responsive to the prisoner's interest in access to the courts.

Shifting its attention to the other side of the prison walls, the Seventh Circuit Court of Appeals decided two cases dealing with the constitutional protection extended to policemen in their employment. In *Confederation of Police v. City of Chicago*,¹⁰⁶ plaintiff challenged the failure of the Chicago Police Department to provide patrol officers with a grievance procedure or collective bargaining with respect to adverse action taken against them short of discharge or suspension. Reversing the district court's dismissal of the complaint, the appeals court initially held that due process required utilization of a written grievance procedure.¹⁰⁷ The United States Supreme Court vacated this judgment¹⁰⁸ and remanded for further consideration in light of its decisions in related cases. In *Bishop v. Wood*,¹⁰⁹ the Supreme Court had declared that whether a property interest in public employment cognizable under the due process clause exists "must be decided by reference to state law."¹¹⁰

¹⁰³WIS. STAT. § 292.45 (1971). This statute seems to permit, but not require, the appearance of a state prisoner as a witness in a civil trial; provision is made for reimbursement of expenses incurred by the institution in transporting the prisoner. The warden construed this statute to permit the appearance of a prisoner as a witness only when the trial is held in a state court.

¹⁰⁴541 F.2d at 182.

¹⁰⁵*Id.*

¹⁰⁶547 F.2d 375 (7th Cir. 1977).

¹⁰⁷*Confederation of Police v. City of Chicago*, 529 F.2d 89 (7th Cir.), *vacated*, 427 U.S. 902 (1976).

¹⁰⁸*City of Chicago v. Confederation of Police*, 427 U.S. 902 (1976).

¹⁰⁹426 U.S. 341 (1976).

¹¹⁰*Id.* at 344 (footnote omitted).

Taking the hint from this language, on remand the court of appeals re-examined Illinois law and concluded:

There is no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department. . . .

Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail. Accordingly, the judgment of the district court is affirmed¹¹¹

The case of *Olshock v. Village of Skokie*¹¹² also involved the rights of policemen in the face of adverse action taken by their employer. The plaintiff policemen were discharged as a result of administrative hearings that were conducted following a "uniform protest" in which certain policemen reported for work out of uniform. Of the fifty-four policemen who were disciplined, thirty-four were discharged. The only discernible pattern of treatment of the police officers who were disciplined was that the thirty-four who were discharged appeared with an attorney at the hearing, while the twenty who were merely suspended appeared pro se. All had been charged with the same offenses on substantially the same facts. The Seventh Circuit recognized, as it had in *City of Chicago*, that the existence *vel non* of a property interest in public employment cognizable under the Constitution must be decided by reference to state law. Such an interest was found to have been statutorily created in cases of removal or discharge; hence, plaintiffs were entitled to whatever protection the Constitution affords. Even though the court found that the plaintiffs' uniform protest was illegal and would constitute cause for removal or discharge under Illinois law, it held that the arbitrariness of the defendant's response to that protest was contrary to the due process and equal protection clauses of the Federal Constitution. The major significance of *Olshock*, however, lies in the equal protection standard employed, for the Seventh Circuit has added to the list of "suspect classifications." The court stated:

[T]he defendant board and its individual members acted in a wholly arbitrary manner in purporting to distinguish between suspension and discharge. Actually, they were distinguishing between employing or not employing counsel to represent the protest participants. This was a suspect

¹¹¹547 F.2d at 376.

¹¹²541 F.2d 1254 (7th Cir. 1976).

classification for which they failed to show a compelling need.¹¹⁸

Indiana's statutory¹¹⁴ and constitutional¹¹⁵ provisions establishing sixty-day residence in a township as a qualification to vote in primary, general, and city elections were invalidated in *Jackson v. Bowen*.¹¹⁶ Five years ago, in *Dunn v. Blumstein*,¹¹⁷ the United States Supreme Court struck down a similar residence requirement. It stated that "[d]urational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right"; that such laws "force a person who wishes to travel and change residences to choose between travel and the basic right to vote"; and that "[a]bsent a compelling state interest, a State may not burden the right to travel in this way."¹¹⁸ Because, pursuant to the state's schema, a voter's qualifications—including residence—were established by oath at the time of registration to vote, and because registration continued until thirty days before the election, the Court found that the state's one-year and three-month residence requirement added nothing to the state's efforts to prevent nonresidents from voting: "The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident."¹¹⁹ Thus, the residence requirement in *Dunn* was in no way "necessary" to promote the state's "compelling" interest in preventing voting fraud and was, consequently, invalidated on equal protection grounds.

The same reasoning that underlies *Dunn* was employed by the three-judge federal court in *Jackson*, with the same result. Because Indiana's voter qualifications are established by oath¹²⁰ at the time of voter registration, and because registration continues door-to-door until forty-five days before the election and at the principal voter registration office until the twenty-ninth day before the election,¹²¹ the Indiana sixty-day residence requirement was held to suffer

¹¹⁸*Id.* at 1260.

¹¹⁴IND. CODE § 3-1-7-26 (1976).

¹¹⁵IND. CONST. art. 2, § 2.

¹¹⁶420 F. Supp. 315 (S.D. Ind. 1976). In *Affeldt v. Whitcomb*, 319 F. Supp. 69 (N.D. Ind. 1970), *aff'd*, 405 U.S. 1034 (1972), Indiana's former requirement of six months residence in the state was held unconstitutional.

¹¹⁷405 U.S. 330 (1972).

¹¹⁸*Id.* at 342 (footnote omitted).

¹¹⁹*Id.* at 346.

¹²⁰IND. CODE § 3-1-7-9 (1976).

¹²¹*Id.* § 3-1-7-7.

"from the same fatal flaw"¹²² described in *Dunn*. Indeed, it would appear that no durational residence requirement for voting is permissible unless it is tied to the closing of the voter registration period.¹²³ Even then, the reasonableness of the cutoff point for registration will be examined, and a registration period that closes fifty days prior to election "approaches the outer constitutional limits in this area."¹²⁴

VI. Contracts, Commercial Law, and Consumer Law

*Gerald L. Bepko**

A. Conditions in Contracts

In *Blakley v. Currence*,¹ the Indiana Court of Appeals confronted a problem concerning loan or mortgage contingency clauses that may be common in real estate purchase transactions. The parties in that case entered into a sales agreement on May 19, 1973, by which they agreed to transfer an unfinished home for \$24,750. The agreement provided that the sale was contingent upon the buyer acquiring loan approval for part of the purchase price. Thereafter, in furtherance of the agreement, the buyer contacted five financial institutions in order to obtain financing for the purchase of the unfinished home along with financing for the construction work needed to complete the home.² Unfortunately, the buyer's application was rejected by each of these lenders. In one case, the lender preliminarily agreed to make the loan but refused final approval because the buyer could not arrange for a commitment from a reputable building contractor to complete the unfinished home.

In late June, the buyer notified the seller that he could not complete the transaction, and on July 6, the seller brought an action for

¹²²420 F. Supp. at 317. Like the Supreme Court in *Dunn*, 405 U.S. at 357, the court rejected the residence requirement "as a means of affording some surety that a voter will more likely exercise his right to vote more intelligently." 420 F. Supp. at 317.

¹²³See *Marston v. Lewis*, 410 U.S. 679 (1973).

¹²⁴*Burns v. Fortson*, 410 U.S. 686, 687 (1973).

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¹361 N.E.2d 921 (Ind. Ct. App. 1977).

²The specific language of the agreement was not reprinted in the opinion. It is not clear, therefore, whether the condition involved acquiring a loan simply for the purchase price or for the purchase price plus an amount needed to complete the unfinished home. It is clear that it was the latter which the buyer sought in making a loan application at one of the lenders contacted. *Id.* at 922.

specific performance. In a bench trial, the court found for the seller and entered a judgment for money damages. The court of appeals reversed, holding that the language "subject to loan approval" created an express condition precedent to the obligation of the buyer to pay for the property. Unless the language of the agreement is clear on the subject, such a clause will not be interpreted "as if the word 'ability' was included,"³ but will be read as a literal requirement for loan approval. Since the buyer did not obtain a loan, the condition was not fulfilled and the performance obligation was terminated.

Where a purchase contract is conditioned upon the buyer obtaining financing at specified rates, courts often impose a duty of good faith on the buyer in seeking loan approval.⁴ Even if the buyer has failed to obtain a loan, he may be in breach because he did not pursue loan applications with reasonable effort.⁵ The trial court's decision in the *Blakley* case could be viewed as a finding of bad faith on the part of the buyer in seeking loan approval. If the trial court did find bad faith, then the only grounds for reversal would be either (1) that no good faith requirement existed or (2) that the buyer acted in good faith despite the trial court's decision on this issue of fact. Neither point was addressed in the appellate court's opinion, thus leaving the good faith question in some doubt.⁶

B. Employee Discharge—Mitigation of Losses

During the survey period the Indiana Court of Appeals returned to the question of the duty of an employee to mitigate losses after the employer's wrongful termination of an employment relationship. In *Seco Chemical, Inc. v. Stewart*,⁷ the court of appeals reversed an award of damages that was computed by deducting the money that the plaintiff had earned in substitute employment from the total amount of plaintiff's salary for the employment period. The basis for the reversal was that a liquidated damages clause in the employment agreement—one that provided for the payment of full salary in the event of wrongful discharge—should have been enforced. However, as an alternative basis for decision the court intimated

³*Id.* at 923.

⁴See *Fry v. George Elkins Realty Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958). For a general discussion of the problem, see *Annot.*, 78 A.L.R.3d (1977).

⁵One way to avoid this problem is to provide in the agreement that the seller will have a reasonable period in which to obtain loan approval for the buyer after the buyer has failed and the mortgage contingency period has expired.

⁶The seller argued the issue of lack of good faith. 361 N.E.2d at 922.

⁷349 N.E.2d 733 (Ind. Ct. App. 1976). See *Bepko, Contracts and Commercial Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 152, 169 (1976).

that there was no obligation to mitigate damages in such a case. The court suggested that the employee was not obligated to accept employment of a substantially different character, or grade, and since the alternate employment was not of that character, recovery "should not have included a consideration of what [the employee] . . . earned—or could have earned"⁸ during the employment period.

This latter dicta may be in conflict with much of the literature on the subject,⁹ and may also be inconsistent with the opinion of the Second District Court of Appeals in *Indiana State Symphony Society, Inc. v. Ziedonis*.¹⁰ In *Ziedonis*, the discharged employee was a musician in the Indiana State Symphony who sued the symphony for the salary due under the contract for the remainder of the employment term, \$6,335. In the course of the trial, the discharged employee admitted to having obtained substitute employment in an orchestra in another city during a portion of the employment period and having been paid fees of \$3,430. The trial court awarded the employee the entire \$6,335, but the court of appeals reversed, indicating that the trial court should have deducted an amount that represented the plaintiff's earnings in the substitute employment. In the course of his concurring opinion, Judge Buchanan stated, "When a discharged employee obtains alternate employment, there is no question that the proper measure of his damages is the amount of compensation agreed upon for the remainder of the contract period involved, less the amount which he earns from other employment."¹¹ Furthermore, the employee's failure to offer testimony as to his expenses incurred in earning the \$3,430 prevented him from deducting those expenses from his earnings in the substitute employment before deducting the substitute earnings from the salary due in the employment period.¹²

C. Employee Bonus Plans—Consideration

In *Spickelmier Industries, Inc. v. Passander*,¹³ the Indiana Court of Appeals addressed a question concerning the right to recover a bonus that had been promised to an employee but which was not a part of the existing employment contract. On December 29, 1971, the board of directors of the defendant-employer determined that a bonus should be paid to five employees for their loyalty during 1971.

⁸349 N.E.2d at 741.

⁹11 W. JAEGER, WILLISTON ON CONTRACTS § 1358 (3rd ed. 1968); J. CALAMARI & J. PERILLO, CONTRACTS § 14 (2d ed. 1977).

¹⁰359 N.E.2d 253 (Ind. Ct. App. 1976).

¹¹Id. at 257.

¹²Id.

¹³359 N.E.2d 563 (Ind. Ct. App. 1977).

According to the plan, the plaintiff, Passander, was to receive a bonus of \$1,500. Shortly thereafter, the executive committee of the defendant-employer discovered that company profits were lower than anticipated and recommended that the bonuses not be paid. However, the chairman of the board refused to abandon the plan and negotiated a compromise with the board whereby one-half of the original "bonus would be paid as planned, with the balance to be paid when and if sufficient funds were available."¹⁴ Apparently Passander knew of these matters, consented to the compromise, and accepted one-half of the \$1,500 bonus. Later in 1972, Passander resigned, never having been paid the other half of the \$1,500 bonus. He sued the employer, and the trial court entered a judgment for \$750, the amount due on the promised bonus.

The court of appeals held that the promise to pay the remainder of the bonus was not enforceable. It stated that there was no consideration for the promise since the promise to pay the remainder of the bonus was not part of any agreed exchange between the parties. The court did not discuss the principle found in section 90 of the *Restatement (Second) of Contracts*, which provides: "A promise which the promisor should reasonably expect to induce . . . forbearance on the part of the promisee . . . and which does induce such . . . forbearance is binding"¹⁵ even though the forbearance is not a part of an agreed exchange. In the *Spickelmier* case, if Passander had relied on the promise and declined other employment opportunities, there would seem to be a basis for the trial court's decision that the promise to pay the second half of the bonus was enforceable. However, Passander had apparently not alleged or proved any specific reliance on the promise. The court took careful note of this fact and described it as "a fatal omission."¹⁶

D. Wholesaler Termination—Proof of Existence of an Agreement

In *Jos. Schlitz Brewing Co. v. Central Beverage Co.*,¹⁷ the Indiana Court of Appeals was asked to affirm a judgment in favor of a wholesaler of beer against the manufacturer under Indiana Code section 7-2-1-23(a)(2).¹⁸ This statute provides that it is unlawful "unfairly, without due regard to the equities of such wholesaler . . . and without just cause or provocation, to cancel or terminate any agreement or contract . . . for the sale of alcoholic malt beverages."¹⁹ One

¹⁴*Id.* at 564.

¹⁵RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1973).

¹⁶359 N.E.2d at 566 n.3.

¹⁷359 N.E.2d 566 (Ind. Ct. App. 1977).

¹⁸IND. CODE § 7-2-1-23(a)(2) (1976).

¹⁹*Id.*

ground for reversal offered by the manufacturer was that there was no "agreement or contract" between the manufacturer and wholesaler and thus there could be no wrongful termination within the meaning of the statute.

The relationship between the manufacturer (Schlitz) and the wholesaler (Central) was predicated on a "declaration of terms" executed on August 29, 1966. This declaration of terms stated: "The relationship between the parties is exclusively that of Buyer and Seller, and may be terminated by either party at any time, without cause and without notice."²⁰ It also provided: "Buyer acknowledges that Seller has granted no franchise or exclusive territory to Buyer and Seller may at any time without incurring any liability to Buyer sell its products to others in the same trade area as Buyer"²¹ Central had been distributing Schlitz products since 1934 and during that time had engaged in various types of promotional and distribution work on behalf of Schlitz. The event that precipitated the August 29, 1966, declaration of terms was a change in Central's organic structure from a partnership to an Indiana corporation in June 1966.

On appeal, Schlitz argued that the declaration of terms embodied the relationship between Schlitz and Central and that it did not constitute a contract or agreement. The court of appeals agreed with this latter point since the declaration of terms appeared to be illusory. However, the appellate court held that the trial court could have found an agreement from the other circumstances and did not have to rely exclusively on the declaration of terms. The court cited Uniform Commercial Code section 2-204, as codified in the Indiana Code, which states that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."²² The court referred to the continuous conduct on the part of Central, its predecessor partnership, and Schlitz as being sufficient to permit the trial court to find a contract or agreement. This included a recognition that there were certain obligations such as: Central's acceptance and dissemination of Schlitz advertising, Central's continuous efforts to secure greater distribution of Schlitz products and better position on retail shelves and coolers, Central's continuous efforts to sell and install special displays and promotions, Central's efforts to introduce new Schlitz products, Central's efforts to develop the college market, Central's consultation with Schlitz representatives concerning the sales and marketing of Schlitz products, Central's use of Schlitz forms in ordering products and making market

²⁰359 N.E.2d at 569.

²¹*Id.*

²²IND. CODE § 26-1-2-204 (1976).

reports, and Central's efforts to follow Schlitz's policy in keeping fresh beer in retail outlets. Finally, at a meeting just prior to the termination of Central, the Schlitz corporate counsel asked Central to voluntarily withdraw from the relationship. When Central refused, Schlitz gave Central formal notice of termination rather than simply refusing to supply beer, which Schlitz seemed to have had power to do under the declaration of terms. The request for a resignation and the formal notice of termination suggest that Schlitz understood there was a permanent binding contract or agreement between the parties. Since the trial court was justified in finding an agreement or contract, despite the declaration of terms, the trial court's judgment under the statute was upheld as proper.

E. Punitive Damages

The Indiana Supreme Court again granted transfer in a case in which a trial court had awarded punitive damages in a contract action. In *Hibschman Pontiac, Inc. v. Batchelor*,²³ the supreme court reversed the Indiana Court of Appeals and affirmed a trial court conclusion that punitive damages were permissible. The court said that there was sufficient evidence of tortious conduct where "the jury could reasonably have found elements of fraud, malice, gross negligence or oppression mingled into the breach of warranty."²⁴ There was also evidence to suggest that the public interest would be served by the deterrent effect of the punitive damages. Thus, both tests set forth earlier by the supreme court were met in the *Hibschman* case, and the punitive damage award was appropriate.²⁵

Despite the justification for the award of punitive damages in *Hibschman*, the supreme court concluded that the trial court award could not be affirmed. The jury had awarded \$1,500 actual damages and \$15,000 punitive damages, but the supreme court found this to be excessive, applying a "first blush" rule, which suggests that punitive damages should not be awarded if "at first blush they appear to be outrageous and excessive."²⁶ In this case, the court

²³362 N.E.2d 845 (Ind. 1977). The court of appeals decision was discussed in Bepko, *Contracts and Commercial Law*, 1976 Survey of Recent Developments in Indiana Law, 10 IND. L. REV. 151, 161-64 (1976). The reversal of the court of appeals decision was anticipated there.

²⁴362 N.E.2d at 848.

²⁵See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976), where the court concluded that if the conduct was an independent tort or was tortious in nature but did not conveniently fit the confines of a tort, and if the court found that the public interest would be served by the deterrent effect punitive damages provide, then the award of punitive damages in a contract action would be proper.

²⁶362 N.E.2d at 849 (quoting *City of Indianapolis v. Stokes*, 182 Ind. 31, 35, 105 N.E. 477, 479 (1914)).

thought that \$15,000 punitive damages were so high as to violate the first blush rule. Thus, the court ordered a remitter of \$7,500 of the punitive damages. Justice DeBruler concurred in the result but expressed concern that the first blush rule is too vague and urged adoption of a standard of review of punitive damage awards that contains objective limitations.²⁷

The Indiana Court of Appeals also affirmed a punitive damage award in *Jos. Schlitz Brewing Co. v. Central Beverage Co.*,²⁸ discussed above. In that case, Schlitz, the manufacturer, noted that Central, its distributor, had failed to adopt and implement certain "internal controls" designed by Schlitz and as a result, rated the wholesaler unsatisfactory. After some negotiation and disagreement over the need for these internal controls, Schlitz mailed a termination letter to the wholesaler. Apparently Schlitz had not taken any similar action against other wholesalers who had failed to implement these internal controls, and Central was rated by other breweries as a first class wholesaler with good internal practices and record keeping. In addition, there was evidence that Central's termination was in furtherance of a Schlitz plan to reduce the number of distributors in Indiana.

The trial court awarded punitive damages, and the court of appeals affirmed, holding that Schlitz's conduct in attempting to inflict internal controls on Central amounted to oppressive conduct, tortious in nature, as that expression has been defined in Indiana decisions on punitive damages.²⁹ The trial court also found that the real purpose of Schlitz's action in terminating its agreement with Central was to consolidate the number of Schlitz beer wholesalers in Indiana. The court of appeals agreed: "This conduct on the part of Schlitz may properly be viewed as an exhibition of bad faith toward the rights of its wholesalers."³⁰ The appellate court also found that there was sufficient public interest to justify a punitive damage award; apparently such an award would deter beer manufacturers from acting in this oppressive manner with respect to wholesalers.

The award in *Schlitz* included \$50,000 punitive damages and \$1,661 compensatory damages. The defendant argued that the punitive damage award was excessive, and the court of appeals, without the benefit of the supreme court's subsequent opinion in *Hibschman*, affirmed on the ground that the amount of a punitive damage award is within the sound discretion of the trial court and

²⁷*Id.* at 849.

²⁸359 N.E.2d 566 (Ind. Ct. App. 1977). See text accompanying note 17 *supra*.

²⁹*Id.* at 580.

³⁰*Id.*

should only be overturned if it appears to be a "result of passion or prejudice."³¹

The \$50,000 award in *Schlitz* was more than three times the \$15,000 award in *Hibschman*, which was rejected as excessive by the supreme court. At the same time, the compensatory damages in *Schlitz* (\$1,661) were only slightly higher than the compensatory damages in *Hibschman* (\$1,500). Even though the ratio of punitive damages to compensatory damages is much higher in *Schlitz* than in *Hibschman*, there may be justification for the court of appeals decision. First, it is not clear that this ratio should be controlling.³² Second, the deterrence in *Schlitz* may require a larger award since *Schlitz* is a national organization, the second largest brewery in the United States with annual profits in the millions of dollars. Finally, the *Hibschman* award was produced by a jury, which perhaps is open to more rigorous scrutiny on emotional issues such as punitive damage awards than is a judgment in a bench trial such as in *Schlitz*.

F. Parol Evidence Rule

The Indiana Court of Appeals had an opportunity to comment twice on the operation of the parol evidence rule during the survey period. First, in *Board of Directors, Ben Davis Conservancy District v. Cloverleaf Farms, Inc.*,³³ the court dealt with a parol evidence rule question in connection with a contract between a grantor and a grantee of an easement. The court suggested that the intention of the parties at the time of the making of the contract is to be derived from the language used in the instrument unless there is an ambiguity. The test for determining whether an instrument is ambiguous is whether reasonable men would find it subject to more than one interpretation. Secondly, earlier in the year in *Warrick Beverage Corp. v. Miller Brewing Co.*,³⁴ the court of appeals dealt with the parol evidence rule found in the Uniform Commercial Code (U.C.C.).³⁵ The *Warrick* court acknowledged that parol evidence, consisting of course of dealing³⁶ and usages of trade,³⁷ would be admissible not only in cases of ambiguity in the writing but in all cases, unless the evidence contradicted the terms of the writing. This is consistent with the view of the draftsmen of the U.C.C. who stated in the official comments to section 2-202 that it was their intention to reject any require-

³¹*Id.* at 581.

³²The court of appeals emphasized this point. *Id.*

³³359 N.E.2d 546 (Ind. Ct. App. 1977).

³⁴352 N.E.2d 496 (Ind. Ct. App. 1976).

³⁵IND. CODE § 26-1-2-202 (1976).

³⁶*Id.* § 26-1-1-205(1).

³⁷*Id.* § 26-1-1-205(2).

ment that "a condition precedent to the admissibility of the type of evidence" suggested above (course of dealing and usage of trade) "is an original determination by the court that the language used is ambiguous."³⁸ Thus, the standards for determining the admissibility of certain types of parol evidence will differ depending on the context. If the contract is something other than a transaction in goods,³⁹ parol evidence will only be admissible if the court finds that there is an ambiguity in the writing. If the contract involves a transaction in goods, then certain types of parol evidence, such as course of performance, course of dealing, and usage of trade, will be admissible even though there is no ambiguity. However, the evidence of course of performance, course of dealing, or usage of trade will not be admissible if it contradicts the express language of the writing.

Although these standards are formulated differently, there may be some similarity in the analysis. For example, one court might refuse to admit evidence of course of dealing or usage of trade on the ground that there is no ambiguity in the writing. Another court might conclude that no ambiguity is necessary as a prerequisite to the introduction of this evidence, but that in the case in question the language of the writing is clear and the evidence of course of dealing and usage of trade would contradict the writing.

It is clear that the U.C.C. draftsmen considered the possibility that evidence of course of performance, course of dealing, or usage of trade could contradict the express terms in a writing.⁴⁰ It is also clear that in the event of this conflict, the express written terms are to control.⁴¹ It is not clear if the issue of whether evidence of course of dealing or usage of trade contradicts the writing is for the trial court, as part of its parol evidence rule determinations, or whether these questions should be resolved by a jury on proper instructions.

G. Discharge of Sureties

In *Bowyer v. Clark Equipment Co.*,⁴² the Indiana Court of Appeals was asked to determine if the failure to give notice of default to a surety would discharge the surety from his obligation on a guarantee. In that case, the defendant-surety, Bowyer, signed a guarantee for the obligations of Emry, the principal, so that Emry could obtain a dealership from Clark, the creditor. The guarantee contained a provision which stated: "The undersigned hereby waive: . . . (3) Presentment for payment of any instrument of BOR-

³⁸U.C.C. § 2-202, Official Comment 1(c) (1972).

³⁹IND. CODE § 26-1-2-102 (1976).

⁴⁰See *id.* §§ 26-1-1-205(4), 26-1-2-208(2).

⁴¹*Id.*

⁴²357 N.E.2d 290 (Ind. Ct. App. 1976).

OWER or any other person, protest thereof, and notice of its dishonor to any party thereto and to the undersigned"⁴³ This guarantee was executed on November 1, 1970, and by June 1971, Emry was in default on his monthly account in the amount of \$25,000. In July 1971, Emry made up these arrearages and became current in his account. However, after July 1971, Emry was delinquent each month, and in July 1972, Clark determined that Emry was insolvent and could not pay any further indebtedness. It was at this time that Clark finally gave notice to Bowyer of the default and sued on the guarantee. The trial court entered a judgment in favor of Clark in the amount of \$41,522.20, and Bowyer appealed, claiming a discharge based on the failure of the creditor to give timely notice of default so the surety could pursue the principal.

The court of appeals held that where a guarantee is *absolute* no notice of default is necessary. An absolute guarantee is one where the obligation is in existence at the time of the creation of the guarantee contract and the guarantor knows the precise extent of the commitment being made. However, if "the guaranty is collateral and the liabilities guaranteed have not been created and are uncertain in amount, the creditor is required to give notice of the principal's default."⁴⁴ In this case, Bowyer was making a collateral guarantee since at the time the guarantee contract was made, Emry had not yet incorporated and the liabilities to Clark "were unknown, indefinite and no specified payment date was established."⁴⁵ Thus, there was a requirement that notice of default be given to the surety.

Even though, in general, there is a requirement of notice of default in a case such as *Bowyer*, the court still had to determine the impact of the provision quoted above, which waived presentment, protest, and notice of dishonor. The court held that this language, which seems related to the waiver described in U.C.C. section 3-511(2)(a),⁴⁶ concerned only obligations with respect to presentment and default on negotiable instruments. The language did not deal with the obligation to give notice of default in a guarantee of a continuing account and therefore did not relieve Clark of the obligation to give notice.

Finally, in deciding the consequence of Clark's failure to give notice, the court developed a two-step analysis. First of all, where

⁴³*Id.* at 292.

⁴⁴*Id.* at 293. This seems to be a commonly held view. See L. SIMPSON, HANDBOOK ON SURETYSHIP 166-68 (1950). *But see* RESTATEMENT OF SECURITY § 136 (1941) (unless otherwise agreed, surety's obligation to creditor is unaffected by creditor's failure to notify surety of principal's default).

⁴⁵357 N.E.2d at 293.

⁴⁶IND. CODE § 26-1-3-511(2)(a) (1976).

the creditor fails to give notice, the surety is "discharged to the extent of his injury."⁴⁷ Secondly, if "at the time of default the principal is solvent and . . . later becomes insolvent before notice is given, the guarantor is totally discharged."⁴⁸ This analysis may raise some questions. If in the first part of the court's analysis the surety is to be discharged to the extent of his injury, a question is raised as to what injury may exist if the principal has remained solvent. If the principal has more assets than liabilities and is paying obligations as they come due,⁴⁹ it is difficult to see how the surety would be injured by the failure to give notice. On the other hand, the fact that the principal has become insolvent does not mean that the surety's loss will be total. Insolvency is not necessarily a permanent condition, and even if it results in the dissolution of the principal, the surety's loss may not be total. This conclusion may be related to the principle known as *strictissimi juris*, which provides that sureties may be discharged altogether, without proof of injury, for such creditor misconduct as collateral impairment or release of the principal.⁵⁰ In any case, the *Bowyer* court concluded that the surety was totally discharged since the principal had become insolvent during the delay period.

H. Holder in Due Course

In *Western State Bank v. First Union Bank & Trust Co.*,⁵¹ the Indiana Court of Appeals had an opportunity to comment on the burden of proof for establishing holder in due course status with respect to a negotiable instrument. The court acknowledged that once the defendant in an action on an instrument raises a defense, the burden of establishing holder in due course status generally falls on the party asserting the status.⁵² This means that the party asserting holder in due course status has the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.⁵³ However, the court concluded there are some matters with respect to which the defendant might bear the burden of proof. For example, the defendant might urge that the instrument

⁴⁷357 N.E.2d at 294.

⁴⁸*Id.*

⁴⁹There are two definitions commonly offered for the term "insolvent." First, a debtor is insolvent in the "equity" sense when the debtor has not or cannot pay his bills as they come due. Second, a debtor is insolvent in the "bankruptcy" sense when the aggregate of his property is not sufficient to pay debts. See IND. CODE § 26-1-1-201 (23) (1976).

⁵⁰RESTATEMENT OF SECURITY § 128 (1941).

⁵¹360 N.E.2d 254 (Ind. Ct. App. 1977).

⁵²IND. CODE § 26-1-3-307(3) (1976).

⁵³*Id.* § 26-1-1-201(8).

was irregular because it was inconsistent with some relevant custom or usage. If the instrument was irregular, a purchaser would have notice of a defect and could not be a holder in due course. In a case such as this, despite the general policy of requiring the holder to establish status, the defendant would bear the burden of establishing the existence of the custom. According to the court, this reasoning will avoid a requirement that the holder "prove that the contract terms . . . did not deviate from any custom or usage"⁵⁴ with all of the "difficulties which attend proving a negative."⁵⁵

I. Debt Collection Practices

On March 20, 1978, the Fair Debt Collection Practices Act (FDCPA) will become effective.⁵⁶ This new law adds another title to the Federal Consumer Credit Protection Act⁵⁷ and establishes new comprehensive restrictions on the activities of persons engaged in the business of debt collection. In creating these restrictions, Congress found that abusive debt collection practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."⁵⁸ The Senate Committee on Banking, Housing, and Urban Affairs, which held hearings on the new law, found that the widespread national problem of collection abuse included "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."⁵⁹ These problems have been magnified by the fact that there are more than 5,000 collection agencies in the United States, each averaging eight employees, and there were more than five billion dollars in debts turned over to these agencies in 1976.⁶⁰ Finally, there seemed to be universal agreement that only a very small percentage of consumers defaulted because of a willful or indifferent refusal to pay debts; the vast majority of consumers in default were the victims of unforeseen events such as unemployment, overextension, serious illness, marital dif-

⁵⁴360 N.E.2d at 258.

⁵⁵*Id.*

⁵⁶Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 818, 91 Stat. 874 (1977).

⁵⁷15 U.S.C. §§ 1601-1691 (Supp. V 1975).

⁵⁸Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 802(a), 91 Stat. 874 (1977).

⁵⁹S. REP. No. 382, 95th Cong., 1st Sess. 2 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 2967-68 [hereinafter cited as 1977 S. REP].

⁶⁰*Id.*

ficulties, or divorce.⁶¹ The new law addresses these problems, and its purpose is to eliminate abusive debt collection practices by debt collectors and to insure that those debt collectors who refrain from using abusive practices are not put at a competitive disadvantage.⁶²

In order to understand the scope of the new law, it is necessary to examine the definition of the expression "debt collector." This expression has been used to bring the FDCPA's focus on independent debt collectors who have been considered the primary practitioners of egregious collection practices. Implicit in the new law is an assumption that creditors collecting their own past due accounts would be restrained by the desire to protect their image.⁶³ Under the FDCPA, this expression describes any person "who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."⁶⁴ The expression also includes "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."⁶⁵ Specifically excluded from the scope of the definition are: employees of a creditor acting in the name of a creditor, officers or employees of government agencies collecting debts in their official capacities, persons attempting to serve legal process, nonprofit organizations which perform bona fide consumer credit counseling services, attorneys collecting debts on behalf of clients, collection of debts incidental to a bona fide fiduciary obligation such as collection by a trust department of a bank, collection of debts not in default at the time obtained, or collection of debts, such as student loans, originated by the person collecting.⁶⁶

Those persons included in the definition of "debt collectors" are prohibited by the Act from engaging in various types of collection practices. These restrictions and the prohibited practices will be

⁶¹*Id.* at 3, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2969.

⁶²The courts have not developed much protection by way of private civil remedies for consumers who are subjected to aggressive collection techniques. See Note, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. INDUS. & COM. L. REV. 698 (1969). There has been some legislation to regulate debt collection agencies, but the protection afforded consumers has been minimal. See, e.g., the Indiana collection agency license law, which seems directed at protecting creditors from abuses by collection agencies rather than protecting consumers. IND. CODE § 25-11-1-1 (1976).

⁶³1977 S. REP., *supra* note 59, at 2, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2968.

⁶⁴Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 803(6), 91 Stat. 874 (1977).

⁶⁵*Id.*

⁶⁶*Id.*

described below in two parts. The first part will deal with contacts between the debt collector and the consumer. The second part will deal with contacts between the debt collector and third persons. Finally, there will be a brief discussion of the remedies and penalties provided for violation of the new law.

1. *Debt Collector and Debtor.*—In general, unless the debt collector receives prior consent of the consumer, he may not communicate with a consumer⁶⁷ at any unusual time or place or at a time or place that should be known to be inconvenient for the consumer. Unless there is some reason to believe otherwise, a convenient time for communication is, by definition, between 8:00 a.m. and 9:00 p.m., local time.⁶⁸ The debt collector may not communicate with a consumer if he knows the consumer is represented by an attorney with regard to the debt in question. Of course, if the attorney fails to respond within a reasonable period of time, cannot be located, or consents to direct communication with a consumer, this restriction does not apply.⁶⁹ Finally, if the debt collector has reason to know that the consumer's employer prohibits contact by creditors with employees, the debt collector may not contact the consumer at the consumer's place of employment.⁷⁰

In an effort to avoid problems of mistaken identity or collection efforts on an account already paid, the FDCPA also creates a procedure for validating the debt at the outset of communication between the debt collector and consumer.⁷¹ Unless the information is contained in the initial communication, the debt collector shall, within five days after the initial communication with the consumer, send the following: (1) A written notice of the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer disputes the validity of the debt within thirty days, the debt will be assumed to be valid; (4) a statement that if the consumer gives written notice of a dispute concerning the debt, the debt collector will verify its validity; and (5) a statement that upon written request within the thirty-day period the debt collector will furnish the name of the original creditor if different from the current creditor. Apparently most debt collectors already utilize some method of notification and, as a result, this notification procedure should not result in much extra expense or paperwork.⁷² If the consumer gives written notice of a dispute or requests the name of the

⁶⁷*Id.* § 805(a).

⁶⁸*Id.* § 805(a)(1).

⁶⁹*Id.* § 805(a)(2).

⁷⁰*Id.* § 805(a)(3).

⁷¹*Id.* § 809.

⁷²See 1977 S. REP., *supra* note 59, at 4, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2971.

original creditor within the thirty-day period, the debt collector must cease collection of the debt or any disputed portion until the debt collector verifies the debt or obtains the name of the original creditor and mails these to the consumer.⁷³ In this context, the consumer's failure to dispute the validity of the debt may not be construed as an admission of liability.⁷⁴

If a consumer gives written notice of a refusal to pay a debt or of a desire that the debt collector cease further communication with the consumer, the debt collector may not engage in further communication unless such communication advises the consumer that further efforts to collect are being terminated. Additionally, the debt collector may notify the consumer that specified remedies, which are ordinarily invoked by collectors, may be utilized or that the debt collector intends to invoke a specified remedy.⁷⁵

In the course of his work, a debt collector is prohibited from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The FDCPA invites the courts to develop standards during the process of litigation that define "harassment."⁷⁶ However, the following activities are listed in the new law as acts of harassment: (1) The use or threat of violence or other criminal means; (2) the use of obscene or profane language; (3) the publication of a list of consumers who allegedly refuse to pay debts—"shame lists"; (4) the advertisement for sale of any debt to coerce payment; (5) repeated telephoning or engaging any person in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass; and (6) placement of calls without disclosure of the caller's identity.⁷⁷

Debt collectors are also prohibited from making any false or misleading representation in connection with collection.⁷⁸ Examples of false or misleading representations set forth in section 807 of the FDCPA are: (1) false representation or implication that the collector is affiliated with a government entity, including using a badge or uniform;⁷⁹ (2) false representation of the character, amount, or status

⁷³Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 809(b), 91 Stat. 874 (1977).

⁷⁴*Id.* § 809(c).

⁷⁵*Id.* § 805(c).

⁷⁶*Id.* § 806.

⁷⁷*Id.*

⁷⁸*Id.* § 807.

⁷⁹*Id.* § 807(1). This is similar to one of the FTC Guides Against Debt Collection Deception, which provides that "[a]n industry member shall not use any . . . insignia, . . . emblem, or any other means which creates a false impression that such industry member is connected with . . . an agency of government." 16 C.F.R. § 237.3 (1977).

of a debt; (3) false representation of compensation which may be lawfully received by a debt collector for collection work; (4) false representation that the collector is an attorney; (5) threats to take any action that cannot be legally taken or that is not intended; (6) representation that a sale or referral of the debt shall cause the consumer to lose claims or defenses; (7) false representation or implication that the consumer committed any crime; (8) a threat to communicate false information, including the failure to communicate that a disputed debt is, in fact, disputed; (9) use or distribution of written communications which falsely simulate government documents; (10) failure to disclose that the purpose of an inquiry is to collect a debt and that information will be used for that purpose; (11) use of any name other than the true name of the debt collector's business, company, or organization; (12) false representation that documents are or are not legal process forms, which do not require action by the consumer;⁸⁰ and (13) false representation that a collector is a consumer reporting agency.⁸¹

In addition to the restrictions on communications with a consumer, there are also certain unfair practices that are proscribed by the FDCPA. A "debt collector may not use unfair or unconscionable means to collect a debt";⁸² the following examples are offered: (1) collection of any amount not authorized by the agreement or by law; (2) acceptance of a check postdated by more than five days, unless the drawer receives notice in writing of the intent to deposit or collect the check not more than ten nor less than three business days prior to such collection; (3) solicitation of a postdated check for the purpose of threatening or instituting criminal prosecution; (4) threatening to deposit any postdated check prior to the date; (5) imposing charges for communications, such as collect telephone calls, by concealment of the true purpose of the communication; (6) taking or threatening to take any nonjudicial action to take away the con-

⁸⁰Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 807, 95 Stat. 874 (1977). There are other laws proscribing false representation that documents are legal process forms. See FTC Guides Against Debt Collection Deception, 16 C.F.R. § 237.1(7) (1977). See also ch. 88, § 2, 1965 Ind. Acts 124 (formerly codified at IND. CODE § 35-18-13-2 (Burns 1975)) (repealed by Pub. L. No. 26, § 25, 1977 Ind. Acts 160), where the misdemeanor of Deceptive Collection Practice is defined to include "(a) printing for the purpose of sale or distribution, circulating, or offering for sale, or, (b) sending or delivering . . . any notice . . . which . . . simulates a form of court process . . . the intention of which is to lead the recipient . . . to believe the same to be a genuine . . . legal process, for the purpose of obtaining anything of value"

⁸¹A consumer reporting agency is defined in the Consumer Credit Protection Act, 15 U.S.C. § 1681(f) (1970), as "[a]ny person which . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties"

⁸²Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 808, 91 Stat. 874 (1977).

sumer's property if there is no right or intention to do so; (7) communicating with a consumer by postcard; and (8) using language or symbols on envelopes sent to a debtor which indicate that the envelope is used by a debt collector.⁸³ A debt collector may use its business name on envelopes if the name does not indicate the nature of the business; otherwise the debt collector may use only a return address on envelopes.⁸⁴

2. *Debt Collector and Third Persons.*—The right of a debt collector to contact third persons in the course of collection work is narrowly circumscribed. A debt collector is authorized by the FDCPA to contact third persons for the purpose of acquiring location information about the consumer. When engaged in that limited activity, the person attempting to collect the debt must identify himself and state that he is confirming or correcting location information concerning the consumer.⁸⁵ The person collecting the debt may not identify his own employer unless expressly requested to do so and may not state the consumer owes any debt.⁸⁶ In addition, with limited exceptions, the debt collector may not communicate with any third person more than once and, if the debt collector knows the consumer is represented by an attorney, may not communicate with any person other than that attorney.⁸⁷ Finally, debt collectors may not communicate by postcard or use any symbols on envelopes that identify the business of collection.⁸⁸

Beyond the right to seek location information, the debt collector may not communicate with any person other than the consumer, the consumer's attorney, consumer reporting agencies, the creditor, the attorney of the creditor, or the attorney of the debt collector.⁸⁹ Presumably, the debt collector would not be able to communicate with the consumer's employer or others who may have historically been called upon to influence debtors.⁹⁰ There are, however, some limited exceptions to this restriction: Either the consumer or a court of competent jurisdiction may give express permission to the debt collector to communicate with such persons, or communication may be reasonably necessary to effectuate a postjudgment judicial remedy.

⁸³*Id.*

⁸⁴*Id.* § 808(8).

⁸⁵*Id.* § 804(1).

⁸⁶*Id.* § 804(1), (2).

⁸⁷*Id.* § 804(3), (6).

⁸⁸*Id.* § 804(4), (5).

⁸⁹*Id.* § 805(b).

⁹⁰The practice of contacting employers appears to have been approved in some cases by the courts. See, e.g., *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948).

In connection with legal action by debt collectors, there are some restrictions imposed by the new law. These restrictions are directed to a practice sometimes called "forum abuse," a practice in which collectors file suit in a geographically remote forum and often obtain a default judgment. Under the FDCPA, an action to enforce an interest in real property securing the consumer's debt may only be brought in a judicial district in which the real property is located.⁹¹ Also, in any other action brought within the coverage of the FDCPA by a debt collector, the suit may be brought only in the judicial district in which the consumer signed the contract or in which the consumer resides at the time of commencement of the action.⁹²

Finally, the FDCPA prohibits a practice sometimes called "flat rating." A "flat rater" prints and sells to creditors dunning letters bearing the flat rater's letterhead, which appears to be that of a collection agency. The creditors then use these letters to create the impression that a third-party collection agency is collecting the debt. The FDCPA provides that it is unlawful to "furnish any form knowing that such form would be used to create the false belief . . . that a person other than the creditor . . . is participating in the collection."⁹³ Thus, the person furnishing the forms, even though not a debt collector, would be in violation of the FDCPA. The creditor, by virtue of using a name other than his own, would be a debt collector and subject to the general prohibition on deceptive conduct.⁹⁴

3. *Remedies.*—The remedies available for violation of the new law can be divided into two parts: federal agency enforcement methods and private civil remedies. The Federal Trade Commission is given enforcement responsibilities,⁹⁵ assuming jurisdiction under a provision of the FDCPA, which states that a violation of the FDCPA shall be deemed to be an unfair deceptive act or practice in violation of the Federal Trade Commission Act.⁹⁶ If, however, some other federal agency has specific jurisdiction over the type of entity involved in debt collection, that agency will be charged with enforcement responsibility.⁹⁷ For example, compliance with respect to national banks will be enforced under the Federal Deposit Insurance Act by the Comptroller of the Currency.⁹⁸ However, because this is

⁹¹Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 811(a)(1), 91 Stat. 874 (1977).

⁹²*Id.* § 811(a)(2).

⁹³*Id.* § 812(a).

⁹⁴*Id.* § 812(b).

⁹⁵*Id.* § 814(a).

⁹⁶*Id.* § 814(b).

⁹⁷*Id.* § 814.

⁹⁸*Id.* § 814(b)(1)(A).

considered comprehensive legislation, which completely addresses collection abuse problems, the agencies charged with enforcement are not authorized to issue additional regulations.⁹⁹

The private remedy afforded by the FDCPA¹⁰⁰ is similar to the private remedy for violation of other titles of the Consumer Credit Protection Act (CCPA).¹⁰¹ First, if a debt collector fails to comply with any provision of the new title, the consumer may sue for actual damages and a civil penalty not exceeding \$1,000. Unlike the general private remedy under the CCPA, the civil penalty for violation of the FDCPA is not linked to the amount of the finance charge, nor is there a minimum recovery. In the case of a class action, there is a unique feature provided by the FDCPA: The class representatives will be entitled to recover the amount to which they would have been entitled, including the civil penalty, if the suit had been brought as an individual action.¹⁰² In addition, the court may award the members of the class actual damages plus a civil penalty not to exceed the lesser of \$500,000 or 1% of the net worth of the debt collector.¹⁰³ Under the general remedy provision of the CCPA, there is a different formulation in which the representative plaintiffs in a class action are entitled to recover only an equal share of the class recovery along with all other class members. In addition, there is an identical limit on the total amount of class recovery—\$500,000 or 1% of the net worth of the creditor.¹⁰⁴ The result is that in some cases under the general private remedy section of the CCPA an injured consumer might find it a disadvantage to bring a class action since the recovery of a representative plaintiff would, because of the maximum limits on class recovery, be less than an individual recovery. This problem seems to have been solved adroitly in the FDCPA.

Finally, the new FDCPA provides that a successful plaintiff is entitled to recover costs of the action together with a reasonable attorney's fee, as determined by the court.¹⁰⁵ This language is identical to the language of the general private remedy provision of the CCPA.¹⁰⁶ However, in the FDCPA, there is an additional provision

⁹⁹*Id.* § 814(d).

¹⁰⁰*Id.* § 813.

¹⁰¹15 U.S.C. § 1640(a) (Supp. V 1975).

¹⁰²Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(2)(B), 91 Stat. 874 (1977).

¹⁰³*Id.*

¹⁰⁴15 U.S.C. § 1640(a)(2), (3) (Supp. V 1975) (amended by Pub. L. No. 94-240, § 4, 90 Stat. 260 (1976)).

¹⁰⁵Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(3), 91 Stat. 874 (1977).

¹⁰⁶15 U.S.C. § 1640 (Supp. V 1975).

which states that if the court makes a finding that the action was brought in bad faith and for the purpose of harrassment, the court may award attorney's fees to the *defendant* in relation to work expended and costs.¹⁰⁷

J. Truth in Lending

In *Mirabal v. General Motors Acceptance Corp.*,¹⁰⁸ the Court of Appeals for the Seventh Circuit addressed several questions under the Federal Consumer Credit Protection Act (CCPA) and the Federal Reserve Board's Regulation Z. The plaintiff, Mirabal, purchased an automobile from defendant Ed Murphy Buick and financed part of the purchase price through defendant General Motors Acceptance Corp. (GMAC). As part of this transaction, Mirabal received a retail installment sales contract with the disclosures required by the CCPA and Regulation Z. Among these disclosures was an annual percentage rate (APR) of 11.08%, a figure which was inaccurate apparently because the figure was taken from the wrong line of a conversion table or rate chart by the employee who filled out the disclosure form. About one week after this transaction, GMAC sent a letter to Mirabal explaining that the APR was computed improperly and providing the correct APR, which was 12.83%. Apparently no further action was taken by GMAC; the Mirabals filed an action a few months later, charging numerous violations of the CCPA based on the defendants' inaccurate disclosure of the APR.¹⁰⁹ The trial judge found seven specific violations of the CCPA and imposed a civil penalty for each violation; he also allowed recovery under the Illinois consumer protection laws. Thus, the defendants were jointly and severally liable for a cumulative judgment in excess of \$8,000.

Both parties appealed, and in the course of the appeal several significant truth-in-lending questions were addressed. Those questions concerned the scope of the CCPA's bona fide error defense for creditors, and three questions exploring multiple recoveries—the right to recover for multiple errors, the right to recover separately against multiple creditors, and the right of joint borrowers to recover separately.

Defendants' principal contention was that the inaccuracy in the APR resulted from a bona fide error for which they claimed an exemption under section 130(c) of the CCPA. That section provides: "A creditor may not be held liable . . . if the creditor shows by a

¹⁰⁷Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(3), 91 Stat. 874 (1977).

¹⁰⁸537 F.2d 871 (7th Cir. 1976).

¹⁰⁹Ed Murphy Buick "arranged for" the extension of credit and GMAC "extended" credit. *Id.* at 874 n.1. See Regulation Z, 12 C.F.R. § 226.2(f) (1977). As a result, both were creditors within the meaning of the CCPA.

preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."¹¹⁰ Although no proof was apparently offered on the specific procedure utilized in this transaction, the defendants did, in general, describe the system GMAC had in operation. That system consisted of training personnel and distributing forms, rate charts, and conversion tables designed to achieve compliance with the CCPA's disclosure requirements. In the course of affirming the trial judge's decision on this point, the court of appeals stated that the immunity provided by section 130(c) was available only if the creditor had instituted some preventive mechanism above and beyond the procedures that were aimed at good faith compliance. The court stated that "it is clear . . . that Congress required more than just a showing that a well-trained and careful clerk made a mistake. On the other hand, a showing that the first well-trained clerk's figuring was checked by a second well-trained clerk or that one clerk made the calculations on an adding machine and then checked this by looking up the figures on a table would satisfy Congress's requirements."¹¹¹ Although in this case the procedures were designed to provide correct disclosures, they did not contain any type of preventive mechanism for catching disclosure errors. In addition, even if such a checking procedure had been adopted, the defendant would have had to show that the procedure was consistently *maintained*. Apparently there was a gap in defendants' testimony on this point.¹¹²

The court's discussion of the bona fide error defense suggests at least two thoughts for creditors. First, in order to preserve this defense, it seems that a creditor must do more than establish a system of well-trained and careful clerks armed with forms and tables to fill out disclosure forms. The creditor will probably be required to have some checking procedure, such as the clerk checking the figure derived from the table with a calculator. Second, the creditor must maintain the procedures uniformly, and the creditor's employees must be able to testify that a certain procedure and certain charts or tables were used in *all* transactions.

The three other questions raised on appeal dealt with multiple recoveries. First, the trial court had awarded a civil penalty under section 130(a) of the CCPA for each of the several violations that were alleged. On appeal the defendant attacked this holding, arguing that only one civil penalty should be imposed even though multiple violations may exist in the disclosure statement. The court of appeals upheld the defendant's contention on the basis of the CCPA's legislative history and the fact that the CCPA was amended in 1974 to specifically reject multiple penalties for violations in a single

¹¹⁰15 U.S.C. § 1640(c) (Supp. V 1975). Most courts have concluded that bona fide error is confined to clerical errors and does not include such things as mistakes of law. See *Ives v. W. T. Grant Co.*, 522 F.2d 749, 757 (2d Cir. 1975).

¹¹¹537 F.2d at 878-79.

¹¹²*Id.* at 879.

transaction.¹¹⁸ The court also noted the problems that would be raised by permitting a civil penalty to be imposed for each of a series of disclosure errors. For example, if a disclosure statement were omitted altogether, the court would have no basis for computing the number of disclosure violations. There could be as many as fifty violations and as many as fifty penalties imposed. This result was presumably not the intention of Congress.

Second, the plaintiffs argued that the trial court had erred in holding the defendants jointly liable; they argued that since there were two creditors, each should be held separately liable for the full civil penalty. Some support for this position could be found in the language of the CCPA, which provides: "[A]ny creditor who fails to comply . . . is liable to such person"¹¹⁴ However, the court of appeals affirmed the trial court's holding. It stated that this language was not dispositive since it "could refer to the fact that Congress intended liability for disclosure violations to reach each and every creditor rather than just the creditor who held the credit contract or the one who made it. And, thus, it need not imply that joint creditors are separately liable"¹¹⁵ Since only one of the creditors was receiving the benefit of the finance charge and, in effect, only one was providing credit, their conduct should be viewed as joint conduct, and they should be jointly liable under the Act.¹¹⁶ The court reserved judgment on the situation where two creditors each make separate and independent disclosure errors in one transaction or where each makes separate disclosures and each disclosure contains an independent or different violation.

Finally, the trial judge awarded only one civil penalty for both joint obligors, and the plaintiffs argued that this was in error; they argued that each obligor in the consumer credit contract should be allowed to recover a separate penalty. The court of appeals held that since both obligors incurred debts on the contract, both should be entitled to recover.¹¹⁷ This conclusion is consistent with the

¹¹⁸The 1974 amendments to the CCPA provided that they would "apply in determining the liability of any person under . . . the Truth in Lending Act, unless prior to the date of enactment of this Act [Oct. 28, 1974] such liability has been determined by final judgment of a court of competent jurisdiction and no further review . . . may be had by appeal or otherwise." Pub. L. No. 93-495, § 408(e), 88 Stat. 1500 (1974). The transaction in the *Mirabal* case took place in July 1971, and the trial court's decision was entered before these amendments were enacted. The court of appeals in *Mirabal* honored the statute's retroactive provision and rejected a constitutional attack by the plaintiffs. 537 F.2d at 875.

¹¹⁴15 U.S.C. § 1640(a) (Supp. V 1975).

¹¹⁵537 F.2d at 881.

¹¹⁶See also Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511, 520-21 (5th Cir. 1976).

¹¹⁷There seems to be some disagreement on this question. Compare Hinkle v. Rock Springs Nat'l Bank, 538 F.2d 295, 297 (10th Cir. 1976) with Clausen v. Beneficial Fin. Co., 423 F. Supp. 985 (N.D. Cal. 1976) and *Mirabal* v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976). See text accompanying note 108 *supra* for a discussion of *Mirabal*.

language of the statute, which states: "[A]ny creditor who fails to comply [with this Act] with respect to any person is liable to such person . . ."¹¹⁸ Finally, the court noted that its decision would obviate some practical questions that might be generated by a holding that joint obligors could recover only one penalty. For example, if one joint obligor sued and the other joint obligor was not joined as a party, would the suing obligor be entitled to recover the full penalty or only one-half of it? If one joint obligor recovered the entire penalty, could the other joint obligor sue for his one-half?

VII. Criminal Law and Procedure

*M. Anne Wilcox**

The decisions handed down during this survey period and discussed in this Article deal exclusively with statutory provisions now superseded by the enactment of a unified code of criminal law and procedure for the State of Indiana, effective on October 1, 1977.¹ The Indiana Supreme Court and Court of Appeals opinions and judicial interpretations under prior law will have continued vitality for the practitioner as prosecutions under these former statutes reach the trial and appellate states and will continue to serve as guidelines for the exploration of issues raised by the new Penal Code. The opinions that are included in this survey were chosen for their significance to the area of criminal law with emphasis upon their applicability to general constitutional and procedural principles. The cases are discussed in the order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pre-trial matters and continuing with issues pertaining to the trial and post-trial stages.

A. Search and Seizure

1. *Arrest Warrants.*—The protections afforded by the fourth amendment² in regard to unreasonable arrests and detentions were extended to a defendant in a paternity proceeding in *J.E.G. v. C.*

¹¹⁸15 U.S.C. § 1640(a) (Supp. V 1975).

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¹See Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1 (1976). See also Kerr, *Forward: Indiana's New and Revised Criminal Code, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 1 (1977).

²U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

*J.E.*³ The Second District Court of Appeals created an exclusionary rule applicable to admissions made in a civil proceeding where they were fruits of an illegal arrest or detention.⁴ Upon filing of a verified petition for paternity naming *J.E.G.* as the putative father, the trial court summarily issued a warrant for his arrest pursuant to a statutory provision authorizing issuance of warrants in a paternity action.⁵ The defendant was arrested and detained for eight days in the Madison County Jail prior to his initial appearance before the trial court. The nature of the action and the ramifications of a judgment of paternity were then explained to the defendant, who was unrepresented. In response to a direct inquiry of the court and while under oath, *J.E.G.* acknowledged the child. On this admission alone, the trial court entered a judgment of paternity. The court of appeals held that issuance of an arrest warrant in lieu of a summons in a paternity suit was unreasonable in the absence of probable cause to believe that the defendant was the putative father and that he would not respond to a notice of commencement of the suit against him. Analyzing the seizure provision of the fourth amendment, the court found its application to be controlled by the nature of the physical restraint placed upon a person rather than the purpose underlying the restraint.⁶ Relying upon federal case law that applied the fourth amendment protections to administrative regulatory sear-

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment is applicable only to the federal government. However, most of the guarantees included in this amendment, as well as those found in the other amendments to the United States Constitution which formulate the Bill of Rights, have been incorporated by the fourteenth amendment guarantee of due process, which is applicable to the states. Later references will be to the specific guarantees found in the Bill of Rights.

³360 N.E.2d 1030 (Ind. Ct. App. 1977).

"The court relied upon the recent United States Supreme Court decision in *Brown v. Illinois*, 422 U.S. 590 (1975) (requiring suppression of any confession given after an illegal arrest or detention unless purged of that primary taint), in ruling that the detention was coercive where the defendant's release was conditioned on his confession of paternity. For further discussion of this issue, see text at notes 44-47, *infra*.

⁴IND. CODE § 34-4-1-13 (1976) provides: "Upon the filing of such petition the court may direct the clerk to issue a warrant in lieu of a summons for the defendant, if the defendant be the alleged father. Such warrant and the issuance and execution thereof shall be as provided for by law in criminal actions."

"The court referred to the Indiana Supreme Court's recognition of the arrest provision of IND. CODE § 31-4-1-13 (1976) as criminal in character in *State ex rel. Beaven v. Marion Juvenile Court*, 243 Ind. 209, 184 N.E.2d 20 (1962), and analogized the statutes governing issuance of an arrest warrant for commission of a misdemeanor. *J.E.G. v. C. J.E.*, 360 N.E.2d at 1034-35. A warrant is sanctioned only if the court has reasonable cause to believe that the accused will not appear as directed. IND. CODE § 35-1-17-2(b) (1976).

ches,⁷ the court held that any restraint upon individual liberty occasioned by an arrest is subject to a requirement of reasonableness.

2. *Investigatory Stops.*—A detention is considered to be a technical seizure of the person and must conform to the dictates of the fourth amendment, which proscribes "unreasonable searches and seizures." The issue surfaces in the context of a defendant's attempt to suppress the introduction of evidence seized during a search incident to the detention. A warrantless seizure must be predicated upon circumstances that would justify both the initial stop and the extent of the subsequent search.⁸ Investigatory stops encompass the brief detention of a suspect for the purpose of inquiry into his identity, conduct, or knowledge of criminal activity and a stop and frisk procedure, which entails a physical invasion of the suspect to determine if he is armed or dangerous.

Two decisions by the First District Court of Appeals discussed the standard applicable to investigatory stops. *Madison v. State*⁹ held that the constitutionality of a detention for purposes of mere inquiry depends solely on the reasonableness of the action taken by the police. The defendant was asleep in a car parked in the picnic area of a park on a Sunday morning. Upon approaching the car to determine if the defendant was "all right," one officer observed a belt buckle worn by the defendant, which appeared to be a pipe for smoking marijuana. He looked into the window of the car where he observed three cellophane bags containing the drug, which he seized.

The court held that there are two standards in Indiana for measuring the reasonableness of an investigatory stop. A stop is authorized for "unusual conduct" whenever an officer reasonably infers from on-the-scene observations and in light of his experience

⁷See, e.g., *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁸The parameters of a warrantless intrusion into the "zone of privacy" are defined by statute in Indiana in accordance with the United States Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), which permits an officer to approach a person to investigate possible criminal behavior even though he lacks probable cause to make an arrest. IND. CODE § 35-3-1-1 (1976) authorizes a stop for "unusual conduct" whenever

a law enforcement officer in a distinctive uniform, or in plain clothes after having identified himself as a law enforcement officer reasonably infers, from the observation of unusual conduct under the circumstances and in light of his experience, that criminal activity has been, is being, or is about to be committed by any person, observed in a public place said officer may stop such person for a reasonable period of time and may make reasonable inquiries concerning the name and address of such person and an explanation of his action. Said stopping and inquiry shall be limited to those matters under the enforcement jurisdiction of the particular officer and when conducted within the limits specified herein shall not constitute official custody or arrest and shall not constitute grounds for civil liability for false arrest or false imprisonment.

⁹357 N.E.2d 911 (Ind. Ct. App. 1976).

that criminal conduct is involved.¹⁰ This also entails a dual inquiry to determine whether the initial investigation was justified and, if so, whether the circumstances called for a check for identification. The court held that the officers were justified in approaching the defendant's car on the basis of their concern for his well being, but his appearance and response were sufficient to dispel the need for further investigation. A separate standard is applied when the investigatory stop is founded on information supplied by another person rather than the officer's personal observation. The facts known to the officer at the time he stopped the defendant must be sufficient to warrant a reasonable man's belief that the investigation was appropriate.¹¹ The same court applied this standard in *Cissna v. State*,¹² where an officer responded to a radioed description of a suspect in a burglary, spotted Cissna in the vicinity of the crime, and requested that he identify himself. The issue before the court was the officer's failure to advise the defendant of his *Miranda*¹³ rights prior to requesting identification. Relying on *Dillon v. State*,¹⁴ the court held that investigation of the circumstances of a crime where a defendant is asked routine questions and is not in custody is not within the ambit of *Miranda*.

The finding of probable cause to detain a defendant for the purpose of a frisk or pat down for weapons was sustained in *Burhannon v. State*,¹⁵ where the situation had the appearance of a drug transaction, but no contraband was actually observed. An officer on surveillance observed an exchange of money between the defendant and a known drug dealer. The court gave weight to the officer's prior experience of arresting the defendant on a drug related charge and a tip from an unidentified source that Burhannon was dealing in narcotics. A full custodial arrest and the search and seizure incident

¹⁰IND. CODE § 35-3-1-1 (1976). See *Landrum v. State*, 338 N.E.2d 666 (Ind. Ct. App. 1975).

¹¹*Luckett v. State*, 259 Ind. 174, 284 N.E.2d 738 (1972), and *Williams v. State*, 261 Ind. 547, 307 N.E.2d 457 (1974), required a driver of a motor vehicle to produce an operator's license when stopped by an officer responding to a radio dispatch regarding a crime committed where the vehicle matched the description given in the communiqué.

¹²352 N.E.2d 793 (Ind. Ct. App. 1976).

¹³*Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court required that a suspect undergoing custodial interrogation must be advised that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

¹⁴257 Ind. 412, 275 N.E.2d 312 (1971) (defendant was asked if he had the fruits of a crime in his possession).

¹⁵361 N.E.2d 928 (Ind. Ct. App. 1977).

thereto were justified by the defendant's resistance to the limited intrusion of a stop and frisk investigation. The analysis of the Second District Court of Appeals comports with the two-step process enunciated by the Indiana Supreme Court in *Elliott v. State*,¹⁶ where the officers, acting on information supplied by a confidential informant, went to the location specified and observed the defendant in the company of two known drug users. Although the defendant was not the individual named by the informant, the arresting officer's knowledge of his record of drug related offenses warranted a cursory investigation.¹⁷ The initial detention being lawful, the officer's observation of a bulge in Elliott's pocket justified the subsequent frisk of the defendant.

3. *Motor Vehicles.*—Some equivocation was apparent in the Third District Court of Appeals decision in *Clark v. State*¹⁸ with respect to the burden of proof required to justify an investigatory stop of a motor vehicle. In *Clark*, the defendant was stopped in his vehicle on the basis of a radio description, which included the license number, model, color, and number of occupants. The information was supplied by a security guard who had observed two "suspicious" persons, one of whom was carrying a handgun concealed in a brown handbag. Clark was searched after being placed under custodial arrest on a traffic warrant. As a result, a vial of heroin was seized from his person. The court held that the initial stop was founded upon the information supplied by the radio dispatch and that officers are not required to ascertain the reliability or credibility of the initial source of the information.¹⁹ The court distinguished *Jackson v. State*²⁰ in which the court previously held that the stop and subsequent search and seizure were improper because an informant's tip was not shown to be reliable, on the grounds that the informant was unknown and that the defendant was in a parked vehicle when approached. The court confused the issue by further holding that the security guard's observation of Clark carrying a concealed weapon was "unusual conduct" that would constitute a crime in the absence of a license. This seemingly undermines the

¹⁶262 Ind. 413, 317 N.E.2d 173 (1974).

¹⁷Cf. *Bowles v. State*, 256 Ind. 27, 267 N.E.2d 56 (1971); *Jackson v. State*, 157 Ind. App. 662, 301 N.E.2d 370 (1973) (in both cases information supplied by unknown informants was held to create a mere suspicion of illegal activity).

¹⁸358 N.E.2d 761 (Ind. Ct. App. 1977).

¹⁹The dissenting opinion presents a cogent analysis of the ramifications of a literal interpretation of this statement in light of *Madison v. State*, 357 N.E.2d 911 (Ind. Ct. App. 1976), which held that a separate standard applies when the investigatory stop is founded on information provided by another person. *Id.* at 913. The dissent argued that the creation of a "new standard of probable cause for electronic communications" would encompass only form and mode of transmission. 358 N.E.2d at 764 (Staton, P.J., dissenting).

²⁰157 Ind. App. 662, 301 N.E.2d 370 (1973).

court's earlier statement that an officer has no duty to verify the original source of information in an official radio dispatch. The rationale supplied to support the officers' continued detention of Clark for identification was the danger inherent in the suspects' use of an automobile on public streets while armed. The capacity for instant mobility possessed by Jackson, who was found behind the wheel of his parked vehicle, and the informant's statement that he was armed with a deadly weapon substantially weakens the factual distinctions drawn by the court.

The express adoption of the objective test of *Terry v. Ohio*²¹ to determine the reasonableness of an investigatory stop may support a narrower interpretation of the holding in *Clark*, bringing the Third District's position on the amount of information required to stop a motor vehicle in line with recent Indiana Supreme Court decisions.²² The *Clark* court's reliance on information received from other sources as well as on-the-scene observations of a quasi-law enforcement official signals its acceptance of the standard found in *Luckett v. State*,²³ which emphasizes the officer's knowledge rather than his observations alone. Two cases involving investigatory stops have been decided by the Third District Court of Appeals since *Clark*. *Zanik v. State*²⁴ upheld an investigatory stop of a motor vehicle partially founded on information relayed by radio without discussion of its reliability or credibility. The officer's observations at the scene corroborated the report and were arguably sufficient in themselves to justify the stop, yet the court applied the *Luckett* standard and determined reasonableness from the officer's knowledge. *Jenkins v. State*²⁵ upheld a stop and frisk based solely on the officer's observations without reference to *Luckett*.

B. Pre-Trial Confrontations²⁶

The "independent basis test"²⁷ is applied to determine whether an unconstitutionally suggestive pre-trial identification resulted in

²¹392 U.S. 1 (1968).

²²*Luckett v. State*, 259 Ind. 174, 284 N.E.2d 738 (1972), held that an officer could rely on information received from other sources in determining the need for a stop and frisk and was not limited to his "observations of 'unusual conduct' under the circumstances and in light of his experience" as provided in the statute. *Id.* at 179-82, 284 N.E.2d at 741-43. This standard was applied in *Williams v. State*, 261 Ind. 547, 307 N.E.2d 457 (1974). For further discussion of this issue, see Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 112, 114-17 (1974).

²³259 Ind. 174, 284 N.E.2d 738 (1972).

²⁴361 N.E.2d 202 (Ind. Ct. App. 1977).

²⁵361 N.E.2d 164 (Ind. Ct. App. 1977).

²⁶For an example of an impermissibly suggestive pre-trial identification, see *Foster v. California*, 394 U.S. 440 (1968).

²⁷The Indiana Supreme Court adopted this test in *Swope v. State*, 325 N.E.2d 193

the likelihood of irreparable misidentification, which tainted any subsequent identification. This test considers only the objective circumstances surrounding the witness' observation of the defendant. In *Norris v. State*,²⁸ the defendant misapprehended the constitutional framework that supports the finding of fatally tainted in-court identification. The "independent basis test" is part of a separate doctrine that mandates the exclusion of testimony of an extrajudicial identification conducted so as to deny the defendant the assistance of counsel.²⁹ It becomes relevant only after the pre-trial confrontation is held to be violative of fundamental due process.³⁰ Norris claimed that the witness' viewing of a newspaper photograph of him was unduly suggestive and precluded an independent basis for his in-court identification. The court held that this could not be an impermissibly suggestive identification procedure as no "confrontation" between the defendant and the witness occurred. A confrontation as defined by the United States Supreme Court in *Stovall v. Denno*³¹ requires some form of physical contact engineered by law enforcement agencies or the prosecution. Absent an unduly suggestive pre-trial procedure, the question of the witness' independent basis for the in-court identification is never reached.

The Indiana Supreme Court found no substantial likelihood of misidentification flowing from a confrontation between the defendant and a witness at an in-court deposition. *Henson v. State*³² suggested that the trial court should have granted defendant's motion to absent himself from counsel's table when no prior identification by the witness had been made. The serious courtroom atmosphere, testimony given under oath, and prior meetings with the defendant where the witness was not under stress provided an objective basis for her identification of Henson at trial.

C. Confessions and Admissions

1. *Voluntariness*.—In *Works v. State*,³³ the Indiana Supreme Court considered and rejected application of a *per se* rule of inadmissibility to statements made during a custodial interrogation where the defendant had previously elected to remain silent. Im-

(1975). See also *Carmon v. State*, 349 N.E.2d 167 (Ind. 1976); *Vicory v. State*, 262 Ind. 376, 315 N.E.2d 715 (1974).

²⁸356 N.E.2d 204 (Ind. 1976).

²⁹See *United States v. Wade*, 388 U.S. 219 (1967); *Winston v. State*, 263 Ind. 8, 323 N.E.2d 228 (1975). See also *Edwards v. State*, 352 N.E.2d 730 (Ind. 1976) (line-up held two hours after robbery and second line-up held a "few days" later without the presence of counsel in violation of *Wade-Gilbert* rule did not preclude an in-court identification based on observation of the defendants during the crime).

³⁰See *Stovall v. Denno*, 388 U.S. 293 (1967).

³¹*Id.*

³²352 N.E.2d 746 (Ind. 1976).

³³362 N.E.2d 144 (Ind. 1977).

mediately after being placed under arrest, the defendant was advised of his constitutional rights, which included advisement of his right to remain silent.³⁴ To this the defendant replied that he understood his rights and had no statement to make. Works was again advised of his rights after being taken from his cell to an interrogation room upon his request to "talk to someone." Although he refused to sign a written waiver on that occasion, he spontaneously volunteered certain incriminating information and responded to questions when asked by a police detective. Works had been in custody eight hours when he was again removed from his cell, taken to an interrogation room, and read a statement of his rights for the third time, whereupon he signed a waiver form and made a full confession.

As the record was devoid of evidence concerning the circumstances surrounding the final interrogation, the only question before the court was the effect of the defendant's initial exercise of his right to remain silent. Works' contention that his decision to stand mute was an absolute bar to the admissibility of any subsequently given confessions was summarily rejected. The court held that the determination of voluntariness must be made from the totality of circumstances.³⁵ The majority opinion intimated that once a person has been advised of his rights and chosen to remain silent it would be improper for the police to reopen an interrogation on the same crime, notwithstanding a reiteration to the defendant of his constitutional rights.³⁶ The eight-hour period of detention during which Works was not taken before a magistrate was not discussed by the court, presumably because it was not raised on appeal.

³⁴No challenge was made to the timing or adequacy of the warnings given. Failure to give each and every one of the warnings specified in *Miranda*, see discussion in note 13, *supra*, may not be fatal where there is no resulting harm. See *Cooper v. State*, 158 Ind. App. 82, 301 N.E.2d 772 (1973) (failure to advise of the right to court appointed counsel where the defendant was not an indigent).

³⁵*Johnson v. State*, 250 Ind. 283, 235 N.E.2d 688 (1968), articulated the standard for determining voluntariness: "[W]hether under all the attendant circumstances, the confession was free and voluntary, freely self-determined, the product of a rational intellect and a free will, and without compulsion or inducement of any sort, or whether the accused's will was overborne at the time he confessed." *Id.* at 293, 235 N.E.2d at 694.

³⁶Although the court cited the 1975 Supreme Court decision in *Michigan v. Mosley*, 423 U.S. 96 (1975), as contrary to a rule of *per se* inadmissibility of confessions made after an election to remain silent, there is a crucial factual distinction between *Mosley* and the instant case. *Mosley* asserted his right to remain silent on the original charge. He was readvised and interrogated on a *different* offense, to which he confessed. *Mosley* held that while in custody a suspect's right to terminate questioning on a specific offense must be "scrupulously honored." *Id.* at 104. For further discussion on this point, see *Wilson, Criminal Law and Procedure, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 174, 180-86 (1974).

The criteria for voluntariness are the controlling factors in determining the admissibility of spontaneous or unsolicited statements. The defendant in *Ortiz v. State*³⁷ surrendered himself to the police and volunteered information he believed to be exculpatory. The Indiana Supreme Court held that where there is no interrogation the presumption of involuntariness that arises out of a custodial situation is absent. The defendant's mistaken belief that the content of his statements was exculpatory did not render it involuntary as he was advised of his right to the assistance of counsel to help him make that determination. In this context, the state's burden is fulfilled by showing beyond a reasonable doubt that the police conduct was not excessive, unnecessary, or unreasonable.³⁸

2. *Unlawful Detention.*—A major decision by the Indiana Supreme Court further explored the relationship between the requirements of *Miranda* and the constitutional protections embodied in the fourth and fifth amendments.³⁹ A confession made by the defendant after sixty-eight hours of detention without being taken before a magistrate and without proper advisement of his right to court appointed counsel was the subject of *Williams v. State*.⁴⁰ The defendant's arrest was predicated on unsworn and uncorroborated statements made to a Gary police officer by two persons who had witnessed the planning of a robbery and murder. The officer testified that he did not try to obtain a warrant for the defendant's

³⁷356 N.E.2d 1188 (Ind. 1976).

³⁸The constitutionality of the Indiana statute setting forth the grounds for suppressing a confession obtained by inducement has not been challenged. IND. CODE § 35-1-31-5 (1976) provides: "The confession of a defendant made under inducement . . . may be given in evidence against him, except when made under the influence of fear produced by threats or by intimidation or undue influences; but a confession made under inducement is not sufficient to warrant a conviction without corroborating evidence."

³⁹"Frequently . . . rights under the [fourth and fifth] amendments may appear to coalesce since 'the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.'" *Brown v. Illinois*, 422 U.S. 590, 601 (1975) (quoting *Boyd v. United States*, 116 U.S. 616, 633 (1886)).

Interplay between these two amendments and the exclusionary rules developed to effectuate their protections also arises in the context of a search consented to by a defendant while in custody, *see Kerr, Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 166-68 (1975), as well as in the context of unsolicited confessions or admissions. *See the discussion of* *Works v. State* at notes 33-36, *supra*. Pre-trial identifications, which comply with the right to counsel afforded by the sixth amendment, may be violative of fundamental due process and invoke the exclusionary provisions required by the fifth amendment. *Stovall v. Denno*, 388 U.S. 293 (1967).

⁴⁰348 N.E.2d 623 (Ind. 1976).

arrest and did not take Williams before a magistrate immediately after his arrest because he did not have "probable cause to file a case." Williams was read an incomplete version of his rights upon his arrest and again the following morning when he was questioned. He refused to make a statement when questioned together with two co-conspirators and the two witnesses who, in his presence, agreed to make second statements. On the third day of detention he agreed to take a lie detector test after which he reaffirmed his election to remain silent. William's first confession was given that same day after he was informed that the lie detector test showed he had lied and that a co-conspirator had confessed. A second hand-written confession was obtained after another twenty-four hours of detention.

The court first found the sixty-eight hour delay in taking Williams before a magistrate to be a *per se* violation of the fourth amendment and Indiana statutes.⁴¹ Reserving the question of whether delay beyond the six-hour statutory period renders a confession inadmissible as a matter of law in Indiana,⁴² the court stated that it should at least alert the trial court to the "probable illegality" of the detention. A confession that is preceded by an illegal arrest or detention is subject to scrutiny under the fifth amendment. If found to be voluntary under the requirements of *Miranda*,⁴³ it is subjected to a second inquiry under the fourth amendment to determine if it was induced by the continuing effects of unconstitu-

⁴¹IND. CODE § 35-1-21-1 (1976) permits the arrest and detention of a suspect until a legal warrant can be obtained. A complementary provision reads:

[A] confession made or given by a person . . . while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible [in a criminal prosecution] solely because of the delay in bringing such person before a judge if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made or given by such person within six hours immediately following his arrest or other detention:

Provided, that the time limitation contained in this section shall not apply in any case in which the delay in bringing such person before a judge beyond such six-hour period is found by the trial judge to be reasonable, considering the means of transportation and the distance to be traveled to the nearest available judge.

IND. CODE § 35-5-5-3 (1976).

⁴²See *Apple v. State*, 158 Ind. App. 663, 304 N.E.2d 321 (1973) (period of delay is only one factor to be considered); *Crawford v. State*, 156 Ind. App. 593, 298 N.E.2d 22 (1973) (seemingly contrary in its holding that a confession was admissible because it was given within the six-hour period). For further discussion of this issue, see Kerr, 1974 *Survey*, *supra* note 22, at 154.

⁴³See *Brown v. Illinois*, 422 U.S. 590 (1975). In *Brown*, the Supreme Court followed its 1963 decision in *Wong Sun v. United States*, 371 U.S. 471 (1963), where the taint of an illegal arrest was dissipated by the lawful arraignment, release from custody, and passage of several days preceding Wong's confession.

tional custody. The court explicitly adopted the standard of voluntariness and the test for determining that the confession "was sufficiently an act of free will to purge the primary taint"⁴⁴ set forth by the United States Supreme Court in *Brown v. Illinois*.⁴⁵ The four relevant factors are: (1) Whether the individual was informed of his rights as required by *Miranda*,⁴⁶ (2) the temporal proximity of the arrest and confession, (3) the presence of intervening circumstances, and (4) particularly, the purpose and flagrancy of the official misconduct.⁴⁷ The majority went on to discuss the reasons necessitating a magistrate's review of the factual justification for an arrest or continued detention. Adopting the language of the United States Supreme Court in *Gerstein v. Pugh*,⁴⁸ the court indicated that an officer's on-the-scene assessment of probable cause is legally sufficient to justify arrest and detention for the brief period necessary to take the administrative steps incident to an arrest. This is contrary to the line of Indiana cases that have suggested that an arrest warrant is required if it is practicable for a warrant to be obtained.⁴⁹

D. Assistance of Counsel

1. *Right to Counsel*.—*Wallace v. State*⁵⁰ is the first Indiana case to attempt to reconcile the seemingly antithetical sixth amendment rights to self-representation⁵¹ and assistance of counsel at trial. In *Wallace*, the defendant sought to represent himself but requested the presence of an attorney at trial. The trial court refused to allow court appointed counsel to assist the defendant if he chose to proceed in his own behalf. In reversing the conviction, the court held

⁴⁴348 N.E.2d at 627 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

⁴⁵422 U.S. 590 (1975).

⁴⁶Williams was not informed of his right to court appointed counsel nor was there any explanation of his rights that might have clarified this right. *See also Franklin v. State*, 262 Ind. 261, 314 N.E.2d 742 (1974). The court further implied that an officer's knowledge that no means were available for providing court appointed counsel at this stage would render this inadequate. 348 N.E.2d at 629. *See also Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

⁴⁷The same police procedures employed by the Gary police in the instant case were recently condemned and barred by an order of the United States District Court for the Northern District of Indiana in *Dommer v. Hatcher*, 427 F. Supp. 1040 (N.D. Ind. 1975).

⁴⁸420 U.S. 103 (1975). *See also Kendrick v. State*, 325 N.E.2d 464 (Ind. Ct. App. 1975).

⁴⁹*Stuck v. State*, 255 Ind. 350, 264 N.E.2d 611 (1970); *Throop v. State*, 254 Ind. 342, 359 N.E.2d 875 (1970); *Bryant v. State*, 157 Ind. App. 198, 249 N.E.2d 200 (1973). For a discussion of these cases, *see Kerr, 1974 Survey*, note 22 *supra*, at 138-42.

⁵⁰361 N.E.2d 159 (Ind. Ct. App. 1977), *transfer denied*, 366 N.E.2d 1176 (Ind. 1977) (Givan, C.J., Pivarnik, J., dissenting).

⁵¹U.S. CONST. amend. VI; IND. CONST. art. 1, § 13. *See Faretta v. California*, 422 U.S. 806 (1975); *Illinois v. Allen*, 397 U.S. 337 (1970).

that the right to counsel is a fundamental guarantee that cannot be knowingly or intelligently waived unless the defendant is advised of the nature, extent, and importance of that right and fully understands the consequences of his choice.⁵² The trial court has the duty of making a determination upon the record that the defendant has properly waived his right to counsel.⁵³ The court reserved the issue of whether advisory counsel must be provided upon request of a defendant proceeding *pro se*.

2. *Effective Assistance of Counsel.*—No significant inroads were made into the strong presumption of competency that a defendant must overcome to demonstrate a denial of his right to the effective assistance of counsel.⁵⁴ The burden of showing by strong and convincing proof that his representation was so ineffectual as to render the proceedings a mockery of justice and shocking to the conscience of the reviewing court⁵⁵ was the standard applied to allegations of inadequate consultation time spent by counsel. Two Indiana appellate courts refused to equate minimal consultation time spent with the client to "mere perfunctory action" by the attorney without specific proof of harm caused by counsel's inattention such as the failure to obtain sufficient information to prepare a defense or the failure to prepare trial strategy and present a defense.⁵⁶ Consistent with the presumption of competency extended to trial and appellate counsel, matters of strategy and trial tactics were not sufficient to establish incompetency where counsel failed to preserve error in overruling a motion for discharge by neglecting to include a bill of exceptions in the record on appeal,⁵⁷ failed to subpoena a sole alibi

⁵²See *Johnson v. Zerbst*, 304 U.S. 458 (1938). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁵³*Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Compare this with the duty of the trial court to make and preserve a record of the advisement of constitutional rights prior to accepting a guilty plea. IND. R. CRIM. P. 10.

⁵⁴*Greer v. State*, 262 Ind. 622, 321 N.E.2d 842 (1975).

⁵⁵*Bucci v. State*, 263 Ind. 376, 332 N.E.2d 94 (1975).

⁵⁶"Minimal consultation with the client does not of itself render the representation merely perfunctory. Each case must be judged upon its own facts." *Daniels v. State*, 312 N.E.2d 890, 893 (Ind. Ct. App. 1974); *Wynn v. State*, 352 N.E.2d 493 (Ind. 1976) (consultation of less than one hour and failure to interview one state's witness). See also *Castro v. State*, 196 Ind. 385, 147 N.E. 321 (1925) (defendant did not know of the appointment of counsel until the morning of trial and defendant and counsel were not conversant in common language); *Smith v. State*, 353 N.E.2d 470 (Ind. Ct. App. 1976) (conferred with defendant twice, both times in court room).

⁵⁷*Parsley v. State*, 354 N.E.2d 185 (Ind. 1976). The record contained the motion set out in full but did not include a transcript of the testimony given at the hearing, thereby precluding review except as to the sufficiency of the evidence to support the trial court's factual determination. See also *Turner v. State*, 259 Ind. 344, 287 N.E.2d 339 (1972).

witness,⁵⁸ failed to object to improper remarks of the prosecutor,⁵⁹ and elicited testimony from the defendant on direct examination of a sodomy conviction that had been vacated prior to the defendant's trial for rape.⁶⁰

Potential conflicts of interest arising out of representation of joint defendants by court appointed counsel may deny a defendant his right to the effective assistance of counsel. *McFarland v. State*⁶¹ held that the trial court must inquire into the nature of the conflicting interests. The vehicle to be utilized is the appointment of one attorney to each defendant for purposes of inquiry into the facts and possible theories of defense.

E. *Criminal Rule 4—Speedy Trial*

Delay caused by a defendant's failure to appear may not be chargeable to him where the trial court took no affirmative steps to notify him, and he had no actual notice of the scheduled hearing dates. *Wilson v. State*⁶² held that a defendant in a criminal case does not waive his right to a speedy trial by failing to keep himself informed of the court's action or failing to object to the delay.⁶³ The defendant appeared for arraignment in April 1973, found a jury trial in progress, inquired of the clerk to determine when he would be arraigned, and was later advised by the judge that he would be notified. The defendant testified that he had resided at his family residence and maintained employment with the same employer up to

⁵⁸*Loman v. State*, 354 N.E.2d 205 (Ind. 1976).

⁵⁹*Wynn v. State*, 352 N.E.2d 493 (Ind. 1976).

⁶⁰*Loman v. State*, 354 N.E.2d 205 (Ind. 1976). The court did note the lessened effect of an evidentiary error where trial is by the court, and declined to find incompetency from a single error. *See Blackburn v. State*, 260 Ind. 5, 291 N.E.2d 686 (1973).

⁶¹359 N.E.2d 267 (Ind. Ct. App. 1977). *See also Martin v. State*, 262 Ind. 232, 240 n.3, 314 N.E.2d 60, 66 n.3 (1974), which sets out the suggested procedure to be followed where the attorneys conclude that the defendants do not have antagonistic defenses, and no conflict of interest is present.

⁶²361 N.E.2d 931 (Ind. Ct. App. 1977).

⁶³*Id.* at 934. As Wilson was unrepresented by counsel during this period, the court declined to decide if the duty of a party to a civil action to keep informed of the court's actions without notice would be imposed on a criminal defendant who is represented by counsel. *Bryant v. State*, 261 Ind. 172, 301 N.E.2d 179 (1973) (in addressing the six month rule of IND. R. CRIM. P. 4(A), charged the defendant with knowledge and acquiescence of a trial setting outside the time limits where her counsel had received notice).

See State ex rel Wernke v. Superior Court, 348 N.E.2d 644 (Ind. 1976), where the court held the defendant to have acquiesced in the setting of an arraignment beyond the one-year period prescribed by Criminal Rule 4(C) where neither the defendant nor his counsel were present when the setting was made. Failure to object to the written notice prior to arraignment was deemed to be a waiver.

July 30, 1974, when his bondsman informed him that a warrant for his arrest for failure to appear was outstanding. He then appeared with counsel and was arraigned. On August 9, 1974, he moved for discharge pursuant to Criminal Rule 4(C),⁶⁴ which was denied, and trial was held in February 1975. The court of appeals held that merely making docket entries of scheduled appearance dates without an attempt to serve notice on the defendant did not satisfy the duty of the state to bring a defendant to trial within the time periods prescribed by statute and the dictates of due process.⁶⁵

In *Cooley v. State*,⁶⁶ the defendant was chargeable with the delay caused by his incarceration in another jurisdiction under subdivision A of Criminal Rule 4(C).⁶⁷ The court held that the defendant was not entitled to the operation of Criminal Rule 4(B) as he was not being held in jail under an "indictment or affidavit" charging an Indiana offense.⁶⁸ His claim that the state's knowledge of his apprehension and sentencing in Illinois and its failure to procure his temporary return for trial violated his constitutional guarantees of a speedy trial was rejected as no prejudice was shown.⁶⁹ *Maxey v. State*⁷⁰ held that the six-month period provided in Criminal Rule 4(A)⁷¹ begins to run anew with the filing of a new indictment or af-

⁶⁴IND. R. CRIM. P. 4(C) as it existed prior to the 1974 amendments, provided: "No person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than one year continuously from the date on which a recognizance was first taken therein, but he shall be discharged. . . ."

A violation of the rule is to be determined on the basis of the content of the rule that was applicable when the operative events occurred. *State v. Moles*, 337 N.E.2d 543, 550 (Ind. Ct. App. 1975). *See also Moreno v. State*, 336 N.E.2d 675 (Ind. 1975).

⁶⁵U.S. CONST. amend. VI; IND. CONST. art. 1, § 12.

⁶⁶360 N.E.2d 29 (Ind. Ct. App. 1977).

⁶⁷IND. R. CRIM. P. 4(C) provides:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar

⁶⁸IND. R. CRIM. P. 4(B) as it existed prior to the 1974 amendments, provided: "If any defendant held in jail on an indictment or affidavit shall move for an early trial, he shall be discharged if not brought to trial within fifty (50) judicial days"

⁶⁹360 N.E.2d at 32-33. *See Barker v. Wingo*, 407 U.S. 514 (1972); *Smith v. Hooey*, 393 U.S. 374 (1969); *Hart v. State*, 260 Ind. 137, 292 N.E.2d 814 (1973). *See also Stewart v. State*, 354 N.E.2d 749 (Ind. Ct. App. 1976).

⁷⁰353 N.E.2d 457 (Ind. 1976).

⁷¹IND. R. CRIM. P. 4(A) provides: "No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later)"

fidavit.⁷² The court held no prejudice was shown where the state dismissed the indictment on the day of trial to avoid the sanctions for failure to respond to the defendant's notice of alibi.⁷³

F. Discovery

Expansion of the techniques and procedures for defendants obtaining discovery in a criminal action has received much attention during this survey period and was accompanied by the Indiana Supreme Court's clarification of its 1974 holding in *State ex rel. Keller v. Criminal Court*⁷⁴ with respect to the discretion of the trial court in limiting use of these methods.⁷⁵ In *Murphy v. State*,⁷⁶ the defendant filed a timely motion to depose the state's witnesses, which was denied after oral argument. The Indiana Supreme Court ordered a new trial and emphasized the "right" of a defendant⁷⁷ to obtain discovery without a showing of necessity and imposed the burden on the state to seek a protective order upon a showing of a paramount interest in non-disclosure, undue burden, expense, or no legitimate defense purpose. Absent such a showing, the trial court's denial of the use of depositions for discovery purposes was arbitrary and an abuse of discretion. The supreme court further stated that a

⁷²353 N.E.2d at 461. The same rationale was applied to Criminal Rule 4(B) in *Johnson v. State*, 355 N.E.2d 240 (Ind. 1976). In *Johnson*, the defendant's first trial ended in a hung jury. He was required to file a new motion for an early trial, and the time limitation for holding trial ran from that date.

⁷³353 N.E.2d at 460-61. IND. CODE § 35-5-1-3 (1976). The original indictment charging first degree murder stated an inaccurate date and the state would have been forced to offer evidence at trial of the occurrence on that date only. The court has no discretion granting a motion to dismiss pursuant to IND. CODE § 35-3.1-1-13 (1976) where cause is stated.

⁷⁴262 Ind. 420, 317 N.E.2d 433 (1974).

⁷⁵The clarification in *Murphy* went only to the first prong of the *Keller* decision, regarding the "right" of a defendant to obtain discovery. The second prong of the *Keller* decision was directed at reciprocity in the exchange of information between the defendant and the state. This aspect of *Keller* has yet to receive definitive treatment by the appellate courts and significant questions as to its procedural application remain unanswered. For further discussion of this point, see *Wilson, 1976 Survey, supra* note 36, at 187-89.

⁷⁶352 N.E.2d 479 (Ind. 1976).

⁷⁷The existence of a "right" to obtain discovery is not wholly resolved as the court relied on *Antrobus v. State*, 253 Ind. 420, 254 N.E.2d 873 (1970), a pre-*Keller* decision that limited a defendant's pre-trial access to transcriptions of grand jury testimony by requiring their production upon defense motion only after the witness has testified on direct examination. The court referred to *Antrobus* in its discussion of the defendant's "rights" to discovery and the inherent authority of the trial court to provide the means. This may indicate that the precedential value of this case rests on its delineation of the right to discovery rather than the procedures to be used. For further discussion of this issue, see note 75 *supra*, and *Wilson, 1976 Survey, supra* note 36, at 186-87.

criminal defendant need not first obtain a court order but may take depositions of the state's witnesses by serving written notice on the prosecution, a procedure analogous to that provided in civil cases by Trial Rules 30 and 31.⁷⁸

The court discussed and rejected the state's contention that because the verdict was supported by sufficient evidence found in testimony given by witnesses whom the defendant did not seek to depose, the trial court's erroneous denial of his petition was harmless error.⁷⁹ Echoing the concern it expressed in *Birkla v. State*⁸⁰ with respect to denying a defendant access to potentially exculpatory or mitigating evidence, the court refused to discount the potential prejudice resulting from complete denial of legitimately discoverable material even in the face of seemingly irrebuttable evidence of guilt. The significance of the *Murphy* decision lies in its treatment of discovery as a right afforded a criminal defendant which may be limited or restricted only in response to a compelling need demonstrated by the state. *Murphy* establishes the holding in *Keller* as a doctrinal precedent that not only creates procedural rights but also sets out the test to be applied in balancing those rights against competing interests of the state.⁸¹ The requirement that the trial court support its denial of defense requested discovery by findings of fact sufficient to warrant constraint of a defendant's "rights" underscores the mandatory nature of the disclosure provisions in *Keller*.

The court's express determination that *Keller* and *Carroll v. State*⁸² would supersede section 35-1-31-8 of the Indiana Code as definitive rulings on depositions in criminal cases can be reconciled with recent appellate decisions that upheld restrictions on a defendant's access to certain classes of discovery. In *Marlett v. State*,⁸³

⁷⁸The court expressly upheld the incorporation of the techniques of discovery found in the Indiana Rules of Trial Procedure to criminal cases through Rule 21 of the Rules of Criminal Procedure, which provides: "The Indiana rules of trial and appellate procedure shall apply to all criminal appeals so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

⁷⁹See *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976) (not reversible error unless shown to be prejudicial to the substantial rights of the defendant).

⁸⁰263 Ind. 37, 323 N.E.2d 645 (1975). The court upheld the conviction even though the prosecutor had destroyed a tape recording of a conversation between the defendant and his wife after viewing it for exculpatory evidence but cautioned that the state bears a heavy burden to disprove prejudice where evidence is destroyed before advising defense counsel of its existence.

⁸¹352 N.E.2d at 481-82.

⁸²263 Ind. 696, 338 N.E.2d 264 (1975). *Carroll* applied Trial Rule 32 of the Indiana Rules of Civil Procedure, which governs the use of depositions in criminal cases, while *Keller* specifically incorporated Trial Rules 30 and 31. For further discussion, see Kerr, 1975 *Survey*, *supra* note 39, at 160-62.

⁸³348 N.E.2d 86 (Ind. Ct. App. 1976).

the Second District Court of Appeals dealt with a trial court's denial of the defendant's motion to produce transcriptions of grand jury testimony of the state's witnesses where no pre-trial discovery of these statements had been sought. The defense motion was first made at the conclusion of direct examination after counsel's preliminary questions had established that the witnesses had testified before the grand jury. The court upheld the restrictions on pre-trial discovery of these statements set out in *Antrobus v. State*⁸⁴ but refused to further restrict their disclosure by requiring the defendant to request their transcription and production prior to the witness' testimony at trial. The *Marlett* court, while referring to *Keller* in the context of the trial court's jurisdiction or discretion to grant such a pre-trial request, relied upon the 1975 Indiana Supreme Court decision in *Morris v. State*⁸⁵ as establishing the requisite procedures a defendant must follow to preserve his "right" to production of grand jury testimony where no pre-trial order is sought, or where it is denied.⁸⁶ Limitations on the timing of a defendant's access to transcriptions of grand jury testimony might be justified under the "balancing" doctrine of *Keller*, as clarified in *Murphy*, by a consideration of the specialized nature of these proceedings. The on-going nature of a grand jury investigation, the reliance on hearsay, and the frequent breadth of information elicited could support a finding of a paramount interest, of the possibility of a fishing expedition, or of the harassment of witnesses⁸⁷ sufficient to justify restricting a criminal defendant's access to and use of this testimony.

In *Gutowski v. State*,⁸⁸ the defendant was deemed to have waived his pre-trial discovery rights by failing to conform to the time limitations contained in the court's order that permitted depositions but which denied his request that the state's witness answer written interrogatories.⁸⁹

The Third District Court of Appeals, while adopting the position that a defendant's right to discovery was subject only to the limited discretion of the court where the state showed a paramount interest, appropriately found that the defendant's lack of diligence in

⁸⁴253 Ind. 420, 254 N.E.2d 873 (1970).

⁸⁵352 N.E.2d 705 (Ind. 1976).

⁸⁶348 N.E.2d at 88. Trial in both *Morris* and *Marlett* was held prior to the decision in *Keller*. The decisions in these cases may reflect an unwillingness to apply the mandatory provisions of *Keller* retroactively. For further discussion of this point, see Wilson, 1976 *Survey*, *supra* note 36, at 187.

⁸⁷See *Amaro v. State*, 251 Ind. 88, 239 N.E.2d 394 (1968).

⁸⁸354 N.E.2d 293 (Ind. Ct. App. 1976).

⁸⁹*Id.* at 296-97. In *Banks v. State*, 351 N.E.2d 4 (Ind. 1976), the court suggested that a pre-trial discovery order should fix a day certain for production with exclusion of the evidence at trial as the penalty for non-compliance. *Id.* at 14.

pursuing his rights constituted a waiver.⁹⁰ The propriety of serving written interrogatories or written questions during deposition of a witness in a criminal case was discussed in dicta as being within the discretion of the trial court where necessary to provide the defendant a full and fair hearing.⁹¹ The appropriateness of the use of interrogatories by a defendant was expressly sanctioned by the Third District Court of Appeals in *Hampton v. State*.⁹² The court held that the state, when responding to a pre-trial notice of alibi⁹³ where time is not of the essence, need only specify the date and place the offense was committed. A defendant desiring a precise specification of time should avail himself of an interrogatory.⁹⁴

G. Conduct of the Trial Court

1. *Local Rules.*—In *Dickson v. State*,⁹⁵ the defendant failed to move for suppression of an in-court identification twenty-four hours or more in advance of trial as required by the trial court's rules. The Indiana Supreme Court held that failure to observe local procedural rules may preclude a defendant from asserting constitutional claims only where extrinsic evidence establishes a deliberate attempt to circumvent the rules. The trial court must conduct a hearing to rule out the negligence of counsel or good cause for nonobservance before finding a waiver. The court questioned the validity of the separate divisions of the Marion County criminal court adopting non-conforming rules of practice in light of the statutory provision for adoption of local rules by the general term.⁹⁶

2. *Change of Venue—Criminal Rule 12.*—The relationship between the time limitations contained in Criminal Rule 12 were discussed in *Spugnardi v. State*.⁹⁷ The defendant filed a motion for change of venue from the judge within ten days of entering his plea but more than five days after the cause was set for trial. The court held the five-day limitation does not run from the initial trial setting

⁹⁰354 N.E.2d at 295.

⁹¹The court was careful to clarify the "right" to pre-trial discovery as not rising to the level of a constitutional guarantee contained in the due process clause. 354 N.E.2d at 295.

⁹²359 N.E.2d 276 (Ind. Ct. App. 1977).

⁹³IND. CODE § 35-5-1-2 (Supp. 1977).

⁹⁴The Indiana Supreme Court concurred in *Monserrate v. State*, 352 N.E.2d 721 (1976) but suggested that a motion for greater specificity would more appropriately be directed at the state's response.

⁹⁵354 N.E.2d 157 (Ind. 1976).

⁹⁶*Id.* at 162 (citing IND. CODE § 33-9-9-6 (1976)). *See also Anderson v. State*, 359 N.E.2d 594, 595 (Ind. Ct. App. 1977).

⁹⁷356 N.E. 2d 1199 (Ind. Ct. App. 1976).

as long as the trial date set was beyond the ten-day period.⁹⁸

Variance between the venue alleged in a charge and the venue proved at trial is cured where a transfer has been ordered.⁹⁹ Section 35-1.1-2-6 of the Indiana Code¹⁰⁰ automatically amends the charging instrument. A variance is not fatal unless it is so substantial that it is likely to place a defendant in double jeopardy or mislead the defendant in preparation of his defense.¹⁰¹

3. *Voir Dire*.—A trial court rule allowing twenty minutes per side for oral examination of prospective jurors was found to be an abuse of discretion in *Anderson v. State*.¹⁰² Trial before twelve jurors, one-third of whom had not been questioned on voir dire by the defendant or the State, was held to violate the defendant's right to trial before an impartial jury¹⁰³ and his concomitant right to participate in voir dire¹⁰⁴ to the extent reasonably necessary to an intelligent exercise of the right to peremptorily challenge prospective jurors.¹⁰⁵ The Indiana Supreme Court upheld a twenty-minute limitation on oral questioning by counsel where the trial court first conducted oral examination and permitted counsel to submit written voir dire questions in *Hart v. State*.¹⁰⁶ The state's failure to comply with a trial court order to submit written specifications on questions it would ask prospective jurors was held not to deny the defendant a fair trial or thwart the purpose of voir dire in *Cissna v. State*.¹⁰⁷

4. *Jury Challenges*.—In a case of first impression, the Indiana Supreme Court held in *Stevens v. State*¹⁰⁸ that a defendant is not entitled to challenge a juror peremptorily after the jury is sworn. Upon discovery that a member of the panel (1) was a former co-

⁹⁸*Id.* at 1201. IND. R. CRIM. P. 12 provides that a timely motion for change of judge must be filed within ten days after a plea of not guilty has been entered. The motion will also be timely when filed within five days after setting the case for trial if the trial date is less than ten days from entry of the plea.

⁹⁹*Lewellen v. State*, 358 N.E.2d 115 (Ind. 1976).

¹⁰⁰IND. CODE § 35-1.1-2-6 (1976).

¹⁰¹"[T]he charge must be sufficiently specific so that . . . after jeopardy has attached, if a second charge is filed covering the same evidence, events or facts against the accused, the defendant will be protected." *Madison v. State*, 234 Ind. 517, 546, 130 N.E.2d 35, 48 (1955) (Arterburn, J., concurring).

¹⁰²359 N.E.2d 594 (Ind. Ct. App. 1977).

¹⁰³IND. CONST. art. 1, § 13.

¹⁰⁴See *Wasy v. State*, 234 Ind. 52, 123 N.E.2d 462 (1955). IND. R. TR. P. 47(A) limits this right to the extent of eliminating direct interrogation of prospective jurors by providing for submission of written questions pertinent to and proper for testing their capacity and competence. *Robinson v. State*, 260 Ind. 517, 297 N.E.2d 409 (1973).

¹⁰⁵*Robinson v. State*, 260 Ind. 517, 297 N.E.2d 409 (1973).

¹⁰⁶352 N.E.2d 712 (Ind. 1976). Judge Buchanan, dissenting in *Anderson*, relied heavily upon *Hart* and *White v. State*, 263 Ind. 302, 330 N.E.2d 84 (1975).

¹⁰⁷352 N.E.2d 793 (Ind. Ct. App. 1976).

¹⁰⁸357 N.E.2d 245 (Ind. 1976).

worker of one of the defense witnesses, (2) had discussed the facts of the case with the witness, and (3) had failed to accurately respond to questions in voir dire relative to his familiarity or association with the parties or their witnesses, the defendant moved to set aside submission of the case to the jury. Using a procedure the supreme court had approved, the trial court conducted an examination of the juror to determine whether he had formed a conclusion as to the defendant's guilt, before overruling a challenge for cause. The court expressly overruled *Kurtz v. State*¹⁰⁹ in further upholding the trial court's refusal to entertain the defendant's peremptory challenge upon the motion to withdraw submission of the case to the jury.

5. *Instructions.*—*Feggins v. State*¹¹⁰ addressed the question of the appropriate instruction to be given by a trial court in response to a juror's inquiry on the operation of post-conviction devices that reduce the length of a defendant's sentence. A member of the panel asked if a sentence of life imprisonment would mean imprisonment for the remainder of defendant's life. The court responded that some people are paroled and some are not, but that the issue was not for their consideration. The court upheld this instruction stating that it should only be given in response to a direct question by a juror or as an inadvertant introduction of the subject before the jury.¹¹¹ The court expressly overruled its previous decision in *Watts v. State*,¹¹² which permitted the court and the prosecutor to comment on parole, pardon, and good time where the jury determined the sentence.¹¹³ Appropriate considerations for the jury in fixing the penalty are the mitigating or aggravating circumstances of the crime rather than "personal characteristics" of the defendant, which might bear on future probation.¹¹⁴

H. Defenses

1. *Entrapment.*—At the close of 1976, the Indiana Supreme Court issued its opinion in *Hardin v. State*,¹¹⁵ which revamped the defense of entrapment as a matter of law. The announced rule is in conformity with the new Indiana Penal Code, which closely tracks the approach developed in federal decisions.¹¹⁶ The court expressly

¹⁰⁹145 Ind. 119, 42 N.E. 1102 (1896).

¹¹⁰359 N.E.2d 517 (Ind. 1977). *See also Johnson v. State*, 342 N.E.2d 1185 (Ind. Ct. App. 1977).

¹¹¹359 N.E.2d at 522.

¹¹²226 Ind. 655, 82 N.E.2d 846 (1948), *rev'd on other grounds*, 338 U.S. 49 (1949).

¹¹³226 Ind. at 661, 82 N.E.2d at 849.

¹¹⁴359 N.E.2d at 523.

¹¹⁵358 N.E.2d 134 (Ind. 1976).

¹¹⁶IND. CODE § 35-41-3-9 (Supp. 1977) adopts the majority position found in *Sorrells v. United States*, 287 U.S. 435 (1932), and provides:

overruled *Walker v. State*¹¹⁷ and its progeny to the extent that it requires the state to prove probable cause to suspect that the accused was engaged in illegal conduct. The dual inquiry to be made by the trial court is: First, did the law enforcement officials or their informants initiate or actively participate in the criminal activity, and secondly, did the accused have a predisposition to commit the crime.¹¹⁸ A legitimate concern is raised by the concurring opinion¹¹⁹ with reference to the burden of the state to prove that the police artifices only exposed a previously existing criminal design in the mind of the accused which he is willing and in a state of preparedness to carry out. It suggests that the majority opinion reduces this burden to a mere showing that the accused was not totally innocent in his attitude toward the proposition offered by the police and thereby vitiates the defense of entrapment as a matter of law.¹²⁰

Two districts of the Indiana Court of Appeals have given retroactive application to *Hardin*. The Third District Court of Appeals refused to consider proof of probable cause to suspect that the accused was engaged in illegal activities in *Davila v. State*.¹²¹ Justifying the concurring justice's concern in *Walker*, the court reviewed the sufficiency of the evidence to support the jury's determination that the defendant had "a sufficient propensity to commit the crime irrespective of police inducement," despite its finding that a *prima facie* case of inducement had been established.¹²²

2. *Jeopardy*.—In *Hunter v. State*,¹²³ the First District Court of Appeals held that jeopardy does not attach to a proceeding in juvenile court that results in removal of a child from the parents' custody, so a subsequent criminal prosecution for child abuse and

(a) It is a defense that: 1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and 2) the person was not predisposed to commit the offense. (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

¹¹⁷255 Ind. 65, 262 N.E.2d 641 (1970).

¹¹⁸This second prong of the *Hardin* test of entrapment is retained from *Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970), and preserves the issue of the defendant's subjective state of mind in response to persuasion or inducement by police officials. See *Gray v. State*, 249 Ind. 629, 231 N.E.2d 793 (1967).

¹¹⁹358 N.E.2d at 137 (DeBruler, J., concurring).

¹²⁰*Id.*

¹²¹360 N.E.2d 283 (Ind. Ct. App. 1977). An earlier decision of the third district acknowledged *Hardin* but applied the *Walker* test in effect at the time of the trial without discussion. See *id.* at 287 (Staton, J., concurring). See also *Whitham v. State*, 362 N.E.2d 486 (Ind. Ct. App. 1977) (citing *Davila* in support of retroactive application).

¹²²360 N.E.2d at 286.

¹²³360 N.E.2d 588 (Ind. Ct. App. 1977).

neglect¹²⁴ is not barred.¹²⁵ Jeopardy will attach only where the juvenile proceeding is adjudicatory in nature and has as its purpose the finding of guilt and assessment of punishment.¹²⁶ The court distinguished *Breed v. Jones*¹²⁷ in which the United States Supreme Court held that a juvenile jurisdiction waiver proceeding that required a finding that the juvenile committed the offense was a bar to subsequent trial in a criminal court. Relying on the stated legislative purpose, the court characterized the juvenile proceeding as civil in nature as it was conducted for the purpose of the safety and welfare of the child.¹²⁸ The same rationale was applied in *Walker v. State*¹²⁹ by the Indiana Supreme Court in finding that the waiver hearing required by section 31-5-7-14 of the Indiana Code¹³⁰ was not an adjudication on the merits of the offense charged.¹³¹ The investigation required by the statute is not an adjudication of delinquency as contemplated by *Breed* but is merely determinative of the forum.

The United States Court of Appeals for the Seventh Circuit held that a defendant is placed in double jeopardy in violation of the constitutional prohibition where a state court grants a remand solely to permit the state to prove an essential element of the offense. In *Sumpter v. DeGroote*,¹³² the Seventh Circuit granted the defendant's writ of habeas corpus where the Indiana Supreme Court affirmed her conviction in part for prostitution and remanded for additional findings rather than reversing and ordering a new trial.

3. *Mental Condition.*—(a) *Insanity.*—Several decisions by the Indiana Supreme Court and its appellate divisions this past year reviewed the effect of expert opinions on the jury's determination of a defendant's sanity. Inability of the experts to render an opinion on the defendant's sanity at the time of the offense,¹³³ inconclusiveness on the part of the expert witnesses,¹³⁴ and equivocation in their fin-

¹²⁴IND. CODE § 35-14-1-4 (1976 & Supp. 1977) is the criminal provision. Ch. 41, § 4, 1907 Ind. Acts 59 (repealed 1974) was the civil provision in force during the critical time period. This statute contains no punitive provisions.

¹²⁵360 N.E.2d at 597.

¹²⁶*Id.* at 596.

¹²⁷421 U.S. 519 (1975).

¹²⁸360 N.E.2d at 596. IND. CODE § 31-5-7-1 (1976) expressed the purpose of the act: "The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them"

¹²⁹349 N.E.2d 161 (Ind. 1976). *See also Seay v. State*, 340 N.E.2d 369 (Ind. Ct. App. 1976), for a full discussion of this issue.

¹³⁰IND. CODE § 31-5-7-14 (1976).

¹³¹349 N.E.2d at 166.

¹³²552 F.2d 1206 (7th Cir. 1977). *See also Civil Rights: Feds May Try State Cases Again*, 63 A.B.A.J. 475 (1977).

¹³³Johnson v. State, 358 N.E.2d 748 (Ind. 1977).

¹³⁴Richardson v. State, 351 N.E.2d 904 (Ind. Ct. App. 1976).

dings brought out on cross examination¹³⁵ did not remove the issue from consideration by the jury. The courts in these cases reiterated the factual nature of the determination and the jury's legitimate consideration of lay testimony, acts surrounding the crime itself, and any other evidence of substantial probative value.¹³⁶

(b) *Incompetence.*—The Indiana Supreme Court discussed in several opinions the evidence that may be considered by the trial court in determining the competency of the defendant to stand trial.¹³⁷ Evidence introduced at a post-conviction relief hearing was used to support a finding that the defendant had been competent to enter his plea of guilty in *Schuman v. State*.¹³⁸ The court sanctioned this retroactive determination of competency where a substantial body of psychiatric information was compiled prior to entry of the guilty plea and made a part of the record during the post-conviction relief hearing.¹³⁹ *Ludy v. State*¹⁴⁰ found no error in the trial court's reliance, in part, on the written report of an expert whose testimony was not heard by the judge who decided the issue of competency.¹⁴¹ Testimony by the defendant given at the hearing on his competency and his demeanor were properly considered by the trial court in *Howard v. State*.¹⁴² A trial court must conduct a hearing to determine a witness' competency to testify upon the defendant's request for a psychiatric examination of that witness. The witness in *McNelly v. State*¹⁴³ was originally a co-defendant. He testified at trial that: (1) The court had ordered him to be examined by a psychiatrist and undergo psychiatric treatment after his release on a reduced bond, (2) he had previously been in a mental institution, and (3) his mother told him he had a mental disorder. The trial court's determination of his competency to testify without a hearing was error, and the denial of defendant's petition for a psychiatric examination was an

¹³⁵Maxey v. State, 353 N.E.2d 457 (Ind. 1976). See also Johnson v. State, 358 N.E.2d 748 (Ind. 1977); Smith v. State, 354 N.E.2d 216 (Ind. 1976).

¹³⁶Feller v. State, 348 N.E.2d 8 (Ind. 1976). See also Stamper v. State, 260 Ind. 211, 294 N.E.2d 609 (1973).

¹³⁷The issue of competency may be raised prior to trial by a plea of insanity or a motion predicated upon the provisions of IND. CODE § 35-5-3.1-1 (1976). See Morris v. State, 263 Ind. 370, 332 N.E.2d 90 (1975).

¹³⁸357 N.E.2d 895 (Ind. 1976).

¹³⁹*Id.* at 898.

¹⁴⁰354 N.E.2d 211 (Ind. 1976).

¹⁴¹The defendant stipulated to the court's consideration of evidence given at the first hearing; however, *Schuman* would provide authority for the trial court's use of medical reports in the absence of hearing the expert's testimony.

¹⁴²355 N.E.2d 833 (Ind. 1976).

¹⁴³349 N.E.2d 204 (Ind. Ct. App. 1976).

abuse of discretion in view of the court's knowledge of his mental condition.¹⁴⁴

I. Sentencing

1. *Entry of Judgment—Criminal Rule 11.*—An entry of a "finding of guilty as charged and judgment is now by the court withheld" was found to be without authorization by statute or rule in *Robison v. State*.¹⁴⁵ Recognized as common practice in some courts, the Third District Court of Appeals held that the trial court loses jurisdiction to impose sentence when it deliberately postpones entry of judgment. As an entry of "judgment withheld" is neither a final order nor an appealable interlocutory order, the defendant must either compel the court to enter judgment or apply for a discharge.¹⁴⁶

Discharge was sought by the defendant in *Taylor v. State*¹⁴⁷ for failure of the trial court to impose sentence within the thirty-day period prescribed in Criminal Rule 11. The court entered a judgment of conviction on July 25 and ordered a pre-sentence investigation report to be filed on July 31. Taylor appeared on that date without his counsel, who was ill, and no proceedings were held. The pre-sentence report was filed on August 22. The defendant filed his motion to dismiss and set aside the conviction on September 23, which was denied, and a nunc pro tunc entry of judgment purporting to relate back to the date of conviction was made on October 11. The Third District Court of Appeals held the nunc pro tunc entry to be of no effect.¹⁴⁸ The court then considered the remedy for non-compliance with Criminal Rule 11 where the court without good cause neglects to sentence, and the defendant did not procure the

¹⁴⁴*Id.* at 207. The Indiana Supreme Court held that ordering a psychiatric examination of a witness is a discretionary decision of the trial court in *Reiff v. State*, 256 Ind. 105, 267 N.E.2d 184 (1971); but where there is evidence that a witness suffers from a mental disorder, a psychiatric examination may be required for the determination of competency itself. *Antrobus v. State*, 253 Ind. 420, 435-36, 254 N.E.2d 873, 881 (1970), discussed in *Chadwick v. State*, 362 N.E.2d 483 (Ind. 1977) (co-defendant who withdrew insanity pleas after psychiatric examination determined competent to testify as witness after hearing without additional psychiatric examination).

¹⁴⁵359 N.E.2d 924 (Ind. Ct. App. 1977). Statutory authorization for entry of "judgment withheld" is provided for first offenders under the Controlled Substances Act, IND. CODE § 35-24.1-4.1-13 (1976).

¹⁴⁶IND. R. APP. P. 4(B). See *Clanton v. State*, 308 N.E.2d 726 (Ind. Ct. App. 1974). A motion for discharge may be inappropriate following the decision in *Taylor v. State*, 358 N.E.2d 167 (Ind. Ct. App. 1976).

¹⁴⁷358 N.E.2d 167 (Ind. Ct. App. 1976).

¹⁴⁸Such entries are to enable the court's records to speak the truth of what previously occurred and not to correct or supply an action not actually taken. *Perkins v. Hayward*, 132 Ind. 95, 31 N.E. 670 (1892).

delay.¹⁴⁹ Finding no constitutional right to have sentence imposed in timely fashion, the court rejected a discharge as disproportional to the trial court's error.¹⁵⁰ The court also rejected the suggestion of the dissenting judge that the sentence be reduced by the period of delay.¹⁵¹ Concluding that where no deliberate attempt to indefinitely postpone sentence is shown the delay is not so great as to offend basic notions of fundamental fairness, the court held that the defendant's remedy is to compel the court to impose sentence.

2. *Determination of Applicable Law.*—*Wolfe v. State*¹⁵² reaffirmed the general rule that the law in effect at the time the crime was committed is controlling where the legislature intended the amendment to increase its punitive provisions rather than to have an amelioratory effect. An exception to this general rule would be permitted where a statute is amended between the commission of the crime and the sentence if the amendment were "truly amelioratory."¹⁵³ This principle was applied to the operation of the "good time"¹⁵⁴ statutes in *Jenkins v. Stotts*.¹⁵⁵ Computation of the credit given a defendant for good behavior during his incarceration was construed to extend the benefits of the new statutory computation scheme to benefit inmates who began serving their sentences under the prior system.¹⁵⁶

¹⁴⁹Good cause is presumed where the record is silent on the reason for delay and the defendant makes no objection. *Alford v. State*, 155 Ind. App. 592, 294 N.E.2d 168 (1973). The defendant may not complain if he failed to object to sentencing set beyond the thirty days, but he bears no burden to seek compliance with the rule. *Stout v. State*, 262 Ind. 538, 319 N.E.2d 123 (1974).

¹⁵⁰Prejudice reaching constitutional proportions might result from delay in the commencement of a sentence of incarceration. 358 N.E.2d at 171-72.

¹⁵¹A very intriguing discussion of the appellate court's inherent constitutional powers of review ensued in response to the alternative of revising the sentence. The Indiana Supreme Court has previously discussed its revisionary power under IND. CONST. art. 7, § 4, and declined to review sentences imposed on criminal defendants. *Critchlow v. State*, 346 N.E.2d 591 (Ind. 1976); *Parker v. State*, 358 N.E.2d 110 (Ind. 1976); *Beard v. State*, 323 N.E.2d 216 (Ind. 1975).

¹⁵²362 N.E.2d 188 (Ind. Ct. App. 1977).

¹⁵³*Id.* at 189 (citing *Dowdell v. State*, 336 N.E.2d 699, 702 n.8 (Ind. Ct. App. 1975)) (emphasis in original). The *Dowdell* court stated:

If the legislature had enacted an ameliorative amendment, the application of which would be constitutionally permissible to persons who had committed the crime prior to its effective date, we would be willing to find a statement of legislative intent to apply the sentencing provisions of that ameliorative statute to all persons to whom such application would be possible and constitutional.

336 N.E.2d at 702 n.8.

IND. CONST. art. I, § 18 provides: "The Penal Code shall be founded on the principles of reformation, and not of vindictive justice."

¹⁵⁴IND. CODE. §§ 11-7-6.1-1 to -8 (1976) (repealed effective Oct. 1, 1977 by Pub. L. No. 340, §§ 149-152, 1977 Ind. Acts 1533, 1610-11).

¹⁵⁵348 N.E.2d 57 (Ind. Ct. App. 1976).

¹⁵⁶See Pub. L. No. 43, § 1, 1974 Ind. Acts 181.

3. *Determination of Penalty.*—Two opinions by the Indiana Supreme Court attempted to eliminate the confusion among prior case decisions on the question of the trial court's authority to fix the penalty for an offense absent a determination of sentence in the jury verdict as required by statute.¹⁵⁷ In *Kelsie v. State*,¹⁵⁸ the defendant challenged the form of the verdicts provided the jury and the trial court's authority to impose sentence for second degree murder where the jury's verdict failed to state a penalty. The court held that the verdict forms, which contained no provision for the jury's assessment of penalty, were improper and that the trial court erred when it fixed the sentence rather than the jury. After a review of its recent decisions concerning erroneous sentencing by the trial court, the court returned to the reasoning of its 1926 opinion in *Palmer v. State*¹⁵⁹ and found the error to be harmless where the sentence invoked was the minimum that could have been imposed by the jury. By a logical extension of the holding in *Kelsie*, error in the trial court's assessment of the maximum penalty was rendered harmless in *Fultz v. State*.¹⁶⁰ The court directed the trial court to reduce the sentence to the minimum, thereby negating any prejudice accruing to the defendant from the jury's failure to set the penalty.¹⁶¹ The court distinguished on their facts those cases where: (1) The verdict was void in its entirety because a misdemeanor verdict of guilty expressly stated that no penalty should be assessed,¹⁶² (2) the verdict provided a greater penalty than the statute pro-

¹⁵⁷IND. CODE § 35-8-2-1 to -3 (1976) provides for jury sentencing with exceptions: "When the defendant is found guilty the jury, except in the cases provided for in the next two sections, must state, in the verdict, the amount of fine and the punishment to be inflicted"

Defendants in both cases were convicted of second degree murder for which the penalty is, alternatively, life imprisonment or imprisonment for no less than fifteen years and no more than twenty-five years. IND. CODE § 35-1-54-1 (1976). *Brown v. State*, 252 Ind. 161, 247 N.E.2d 76 (1969), held that the statute clearly requires the jury to state the sentence for second degree murder in its verdict.

Under the recently enacted Penal Code, all sentencing is done by the judge. IND. CODE § 35-50-1-1 (Supp. 1977). Nevertheless, case law under the old system will continue to be relevant as it is applicable to all offenses committed before October 1, 1977.

¹⁵⁸354 N.E.2d 219 (Ind. 1976).

¹⁵⁹198 Ind. 73, 152 N.E. 607 (1926).

¹⁶⁰358 N.E.2d 123 (Ind. 1976).

¹⁶¹The court held that the error was not waived on appeal by *Fultz*'s failure to object at the time of sentencing or by his failure to include it in his motion to correct errors. *Id.* at 125. See also *Kleinrichert v. State*, 260 Ind. 537, 297 N.E.2d 822 (1973). The proper procedure for seeking correction of sentence where the defendant has been harmed is provided by IND. R. POST-CONVICTION RELIEF 1, § 1(a)(3). *Kelsie v. State*, 354 N.E.2d 219, 226 (Ind. 1976).

¹⁶²*Kolb v. State*, 258 Ind. 469, 282 N.E.2d 541 (1972) (the verdict on the felony count tried with the misdemeanor was not affected by the invalid verdict on the misdemeanor count).

vided,¹⁶³ (3) the verdict of guilty on one count stated the penalty provided for on the second count on which there was a finding of not guilty,¹⁶⁴ or (4) other ambiguities existed that rendered the verdict questionable as to which of two charged offenses the finding of guilt was to apply.¹⁶⁵

4. *Revocation of Probation.*—Conviction for a subsequent offense is a statutorily created prerequisite for revocation of probation. *Hoffa v. State*¹⁶⁶ held that an arrest without an adjudication of guilt does not violate the terms of probation even where the trial court imposed the specific condition that the probationer not be arrested. Hoffa's probation was revoked following a hearing where evidence was admitted showing: (1) His arrest was reasonable and proper, (2) he had made two separate sales of marijuana to undercover agents, and (3) his arrest violated a term of his probation. The court held that the trial court's discretion in granting probation must be exercised within the statutory guidelines, which provide for revocation when "it shall appear that the defendant has violated the terms of his probation or has been found guilty of having committed another offense."¹⁶⁷ Reaffirming its decision in *Ewing v. State*,¹⁶⁸ the court held that where the additional conditions require the probationer to "refrain from criminal activity," "behave well," or "not engage in unlawful acts" a criminal conviction for such activity is required prior to probation revocation.¹⁶⁹

5. *Alternatives—Drug Abuse Treatment.*—In its first review of section 16-13-6.1-16 of the Indiana Code,¹⁷⁰ the Indiana Supreme Court dispensed with the constitutional claims raised in *Hammer v. State*.¹⁷¹ The defendant's petition for election of treatment as a drug abuser in lieu of prosecution was denied under the statutory provisions excluding persons who have committed violent crimes. The court dismissed the alleged violation of his right to equal protection on the grounds that the issues raised presented factual questions

¹⁶³West v. State, 228 Ind. 431, 92 N.E.2d 852 (1950).

¹⁶⁴Crooks v. State, 256 Ind. 72, 267 N.E.2d 52 (1971).

¹⁶⁵Martin v. State, 239 Ind. 174, 154 N.E.2d 714 (1958); Crotty v. State, 250 Ind. 312, 236 N.E.2d 47 (1968).

¹⁶⁶358 N.E.2d 753 (Ind. Ct. App. 1977).

¹⁶⁷IND. CODE § 35-7-2-2 (1976). A corollary to the trial court's power to grant probation is its authority to "impose such conditions as it may deem best" on the probationer. *Id.* § 35-7-2-1.

¹⁶⁸310 N.E.2d 571 (Ind. Ct. App. 1974) (relying on the Indiana Supreme Court decision in *State ex rel. Gash v. Morgan County Superior Court*, 258 Ind. 485, 283 N.E.2d 349 (1972)).

¹⁶⁹358 N.E.2d at 757.

¹⁷⁰IND. CODE § 16-13-6.1-16 (1976).

¹⁷¹354 N.E.2d 170 (Ind. 1976).

that could not be resolved without a hearing giving the state the opportunity to defend.¹⁷²

The Second District Court of Appeals upheld the trial court's denial of the defendant's petition for election of treatment in an opinion fraught with inconsistencies. In *Bezell v. State*,¹⁷³ the defendant had been enrolled in a drug maintenance program at the time of his arrest, had been drug-free for one month except for methadone, and stated that he had abused drugs. It was also charged that he had sixteen bindles of heroin on his person when arrested. Bezell argued that if a convicted individual states that he is a drug abuser and shows that he is not ineligible by reason of the nature of the present charge, his prior convictions, or his probation status, the court is required to offer him the opportunity to elect to submit to treatment in lieu of sentencing.¹⁷⁴ The court held that evidence of his drug-free status under the methadone program and the equivocal statement on his current status as a drug abuser rendered him ineligible.¹⁷⁵ The court's opinion casts doubt on the continued validity of *McNary v. State*¹⁷⁶ to the extent that it mandates the trial court to grant the defendant the opportunity to elect treatment and suggests a forthcoming reconsideration of the point.

VIII. Domestic Relations

Helen Garfield ***

A. Adoption—Termination of Parental Rights

1. *Juvenile Court Proceedings.*—The jurisdiction of juvenile courts to order permanent termination of parental rights was the

¹⁷²See *Hardin v. State*, 254 Ind. 56, 257 N.E.2d 671 (1970).

¹⁷³352 N.E.2d 809 (Ind. Ct. App. 1976).

¹⁷⁴This contention is not without conflict. The Second District Court of Appeals held that the court may deny election where it determines that treatment would not rehabilitate the defendant. *Glenn v. State*, 322 N.E.2d 106 (Ind. Ct. App. 1975). The First District Court of Appeals held that a defendant had no right to treatment in lieu of imprisonment because he satisfied the statutory eligibility requirements. *Reas v. State*, 323 N.E.2d 274 (Ind. Ct. App. 1975). In *Thurman v. State*, 320 N.E.2d 795 (Ind. Ct. App. 1974), the Second District Court of Appeals limited the court's authority to suspend a sentence and order treatment to a period of six months after the defendant begins serving his sentence.

¹⁷⁵352 N.E.2d at 811.

¹⁷⁶156 Ind. App. 582, 297 N.E.2d 853 (1973).

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The author wishes to thank Bert Paul for his assistance in the preparation of this survey.

**Several important abortion cases were decided during the survey period. These decisions are discussed in *Grove, Constitutional Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 78 (1977).

issue before the Third District Court of Appeals in *In re Perkins*.¹ Ambiguities in the juvenile and adoption statutes² were resolved in favor of such jurisdiction by the majority, over a strong dissent by Judge Garrard.³

The history of the Perkins children's involvement with the juvenile court and the welfare department dated back seven years; indeed, it antedated the birth of one of the two children made wards of the department in the present proceeding. During this seven-year period, all six children had at various times been found to be dependent and neglected and placed in a children's home, although some of them had subsequently been permitted to return to their parents' home. During the same period, contempt proceedings had been brought against the father for failure to comply with the court's order to pay support for the children placed in the children's home, and the mother had been hospitalized for psychiatric care. Ultimately, the welfare department initiated the present proceeding in which it asked the juvenile court to declare all six children wards of the department "for all purposes including adoption."⁴ The parents appealed the court's decision granting the petition as to two of the children, contesting the juvenile court's jurisdiction to order termination of their parental rights.

The jurisdictional problem presented by this case arises from a lack of coordination between the provisions of the Indiana adoption statutes⁵ and the juvenile statutes,⁶ both dealing with children but involving two essentially different *kinds* of proceedings. Adoption proceedings are initiated in the circuit or probate court by a person seeking to adopt a child.⁷ If the child has living parents, they must consent to the adoption, unless their consent is dispensed with on grounds specified in the statute.⁸ If the parents do not consent,

¹352 N.E.2d 502 (Ind. Ct. App. 1976).

²Ch. 126, § 6, 1905 Ind. Acts 215 (amended 1975) (current version at IND. CODE § 31-3-1-6 (1976)); ch. 126, § 7, 1905 Ind. Acts 215 (amended 1975) (current version at IND. CODE § 31-3-1-7 (1976)); IND. CODE § 31-5-7-1 (1976); *id.* § 31-5-7-7; ch. 356, § 2, 1957 Ind. Acts 1040 (amended 1975) (current version at IND. CODE § 31-5-7-15 (1976)); IND. CODE § 31-5-7-17 (1976). *Perkins* deals with these statutes as they existed in 1973, when the proceedings were initiated.

³352 N.E.2d at 511 (Garrard, J., dissenting).

⁴*Id.* at 504. The *Perkins* majority held that this was, in effect, a final termination of parental rights. *Id.* at 507.

⁵IND. CODE §§ 31-3-1-1 to -11 (1976).

⁶*Id.* §§ 31-5-7-1 to -25.

⁷*Id.* § 31-3-1-1 states that adoption petitions are to be filed in the court "having jurisdiction of probate matters," which would be the circuit or probate court. *Id.* §§ 33-4-4-3, 33-8-1-9. Effective January 1, 1979, the Marion County Superior Court will have jurisdiction in adoptions and juvenile proceedings. *Id.* § 33-5-35.1-4.

⁸*Id.* § 31-3-1-6.

parental rights can be terminated by the court handling the adoption either in the same proceeding or in a separate proceeding, and such termination is sufficient to dispense with the necessity of the parents' consent to the adoption.⁹ The adoption statutes thus specifically authorize the circuit or probate court to order permanent termination of parental rights, and no serious question can be raised as to these courts' jurisdiction to do so.

No such specific authorization is contained in the statutes relating to proceedings in the *juvenile* courts, however. The adoption statutes do contain an oblique reference to termination by other courts "having jurisdiction to terminate parental rights on any ground for termination specified in *that* law,"¹⁰ which may have been intended to refer to juvenile court proceedings but which is hardly sufficient in itself to confer jurisdiction on the juvenile courts. The type of proceedings handled by the juvenile courts are not directed toward adoption but toward securing care, guidance, and control for the child "preferably in his own home."¹¹ Such proceedings are initiated by a court probation officer, by the Department of Public Welfare, or by transfer from a court where the child has been charged with a crime, requesting that the juvenile court declare the child to be delinquent, dependent, or neglected, as those terms are defined in the statutes.¹² Among the dispositional alternatives are commitment to a public institution, probation, supervision in the child's own home, and making the child a ward of the court, the welfare department, or a licensed child-placing agency.¹³ In the context of juvenile proceedings, making a child the ward of the welfare department does not ordinarily contemplate a final termination of parental rights. It involves a temporary rather than a permanent wardship designed to remove the child from the parents' custody while efforts are made to rehabilitate the family.¹⁴ In fact, this is what was done in *Perkins* during the seven years preceding the filing of the petition for permanent wardship.

The *Perkins* majority found a statutory basis for the juvenile courts' power to terminate parental rights in the dispositional provisions of the juvenile statutes (section 15),¹⁵ particularly the catchall provision which authorizes the court to "make such further disposi-

⁹*Id.* § 31-3-1-7(c), (d).

¹⁰*Id.* § 31-3-1-7(c) (emphasis added).

¹¹*Id.* § 31-5-7-1

¹²*Id.* §§ 31-5-7-4.1 to -8.

¹³*Id.* § 31-5-7-15.

¹⁴The distinction is discussed in Judge Garrard's dissenting opinion. 352 N.E.2d at 511.

¹⁵IND. CODE § 31-5-7-15 (1976).

tion as may be deemed to be in the best interests of the child."¹⁸ The majority relied on *In re Collar*,¹⁷ a 1973 case involving a proceeding similar to that involved in *Perkins*, but in which the juvenile court's jurisdiction was not directly challenged by the parent whose rights had been terminated.¹⁸ Judge Garrard, in his dissenting opinion, did not believe that so broad and drastic a power as the termination of parental rights should be implied from the general authorization to make "further disposition . . . in the best interests of the child,"¹⁹ especially since no standards or grounds for termination are set out in either the juvenile statutes or the adoption statutes. The majority, however, supplied its own standards, holding that before an order permanently terminating parental rights can be entered the juvenile court must find: (1) a protracted history of dependency or neglect by the parent(s) as defined by statute, (2) a substantial probability of such deprivation of the child in the future, and (3) that it is not reasonably probable that it will serve the future welfare of the child to continue such child's legal relationship with the parent(s).²⁰ Applying these standards to the facts and findings of *Perkins*, the majority held the evidence sufficient to support the trial court's decision to terminate the Perkins' parental rights.

Judge Garrard's analysis of the statutes construed in *Perkins* and his perception of their deficiencies are eminently sound. The majority does stretch statutory interpretation to its outermost limits, but the result reached in *Perkins* is clearly preferable to a holding that the juvenile courts lack jurisdiction to order permanent termination of parental rights. Such a holding would have raised questions concerning the validity of all previous terminations ordered by juvenile courts, and all adoptions made on the strength of them would have been put in jeopardy. This would hardly have been in the best interests of the children involved, which both statutes purport to serve. However little support there may be for the majority's interpretation of the words in the statutes involved, the court's holding is entirely in harmony with the overall intent and purpose of both the adoption and the juvenile statutes.

Some indirect support for the majority's interpretation can be

¹⁶*Id.* § 31-5-7-15(5).

¹⁷155 Ind. App 668, 294 N.E.2d 179 (1973).

¹⁸The sole challenge raised in *Collar* was to the sufficiency of the evidence to support the trial court's determination. *Id.* at 670, 294 N.E.2d at 181.

¹⁹IND. CODE § 31-5-7-15(5) (1976). The effect of termination is to "divest the parent and the child of all legal rights, privileges, duties and obligations, including rights of inheritance, with respect to each other." *Id.* § 31-3-1-7(g).

²⁰Judge Garrard also felt that the termination provisions of the adoption statute, *id.* § 31-3-1-7, were too "vague and ambiguous" to vest the juvenile courts with power to permanently terminate parental rights. 352 N.E.2d at 517 (Garrard, J., dissenting).

inferred from a 1975 amendment to the adoption statutes, which was enacted *after* the proceedings in *Perkins*. As amended, the statutes now dispense with the necessity of consent where a child has been declared an "abused, dependent or neglected child by the court of jurisdiction" (presumably the juvenile court), and where the parent(s) have been deprived of his custody for a period of two years prior to the adoption, "if there has been little or no change in the environment from which the child was removed."²¹ Although this amendment fails again to *expressly* authorize the juvenile courts to order permanent termination of parental rights, it does implicitly recognize the validity of the kind of proceedings that were upheld in *Perkins*.²²

2. *Termination in Adoption Proceedings.*—(a) *Failure to Communicate.*—Another termination case decided by the Third District Court of Appeals during the survey period concerned a proceeding for adoption, rather than a juvenile proceeding, and thus relied directly on grounds for dispensing with parental consent contained in the adoption statutes²³ rather than on the juvenile statutes. *In re Adoption of Thornton*²⁴ involved a petition filed by the prospective adoptive parents seeking adoption of the child and termination of the mother's parental rights in the same proceeding.²⁵ The trial court's order terminated the mother's parental rights based on section 6(g)(1) of the adoption statute, which dispenses with the necessity for a parent's consent where the parent has failed to "communicate significantly with the child" for a period of one year without justifiable cause.²⁶ The court of appeals held that the evidence was sufficient to support the trial court's order, rejecting the mother's arguments that the failure to communicate was justified and that her filing of a habeas corpus action constituted an

²¹IND. CODE § 31-3-1-6(g) (7) (1976).

²²The standards enunciated in *Perkins* were again applied by the Third District Court of Appeals in *In re Wardship of Bender*, 352 N.E.2d 797 (Ind. Ct. App. 1976), which affirmed an order of the juvenile court permanently terminating a mother's parental rights in her four children. (Judge Garrard also dissented in this case. *Id.* at 805.) Here, as in *Perkins*, the record showed a "protracted history" of involvement with the welfare department. The facts of this case would not have satisfied the standards of the 1975 amendment, had it been in effect at the time, since the children had not been removed from the mother's custody for two years prior to the filing of the petition for final termination of her parental rights.

²³IND. CODE § 31-1-3-6(g) (1976).

²⁴358 N.E.2d 157 (Ind. Ct. App. 1976). This opinion was written by Judge Hoffman, with a concurring opinion by Presiding Judge Staton. Judge Garrard concurred, without opinion.

²⁵This is one of the alternative methods of proceeding authorized by IND. CODE § 31-3-1-7 (1976).

²⁶*Id.* § 31-3-1-6(g)(1).

effort to "communicate" under the statute. The statute was seen as contemplating communication with the child directly and not merely involvement in litigation over custody, although participation in litigation *might* be relevant in a case where persons with custody actively prevented a parent from communicating with the child.²⁷

(b) *Abandonment*.—In another proceeding under the adoption statute, the First District Court of Appeals held that imprisonment of the natural father did not *per se* establish his abandonment of his child so as to justify dispensing with the necessity of obtaining his consent to adoption of the child by the stepfather.²⁸ Abandonment requires a showing of intent, which was not established as a matter of law merely by evidence that the father was imprisoned for a period in excess of six months. The trial court's judgment denying the petition for adoption filed by the mother and her second husband was therefore affirmed.

3. *Due Process Rights of Parents—Notice to Natural Mother*.—In *Egan v. Finnegan*,²⁹ the Second District Court of Appeals sustained a natural mother's challenge to an order permanently terminating her parental rights, but sustained a provision of the same order awarding *custody* of the child to the mother's sister and the sister's husband. The child, born out of wedlock, had been in the sister's physical custody for the first five years of its life. The natural mother later married, and her husband initiated proceedings to adopt her child. The same day, he and the mother forcibly took the child from the sister. The sister and her husband intervened in the adoption proceedings, asking that they be permitted to adopt the child, and also filed a petition for custody, alleging that the child was dependent and neglected. The summons served upon the mother referred only to "a petition alleging that said [child] is dependent and a neglected child,"³⁰ and neither the petition nor the court's order fixing a hearing date contained any reference to final termination of parental rights or to the necessity of the mother's consent to adoption by the sister and her husband. Nevertheless, the court's order included a finding that the natural mother had abandoned the child and that her consent to the adoption was not required.³¹

²⁷358 N.E.2d at 158-59.

²⁸*Murphy v. Vanderver*, 349 N.E.2d 202 (Ind. Ct. App. 1976). IND. CODE § 31-3-1-6 (g)(1) (1976) provides that a parent's consent is not required "if the child is adjudged to have been abandoned or deserted for six [6] months or more immediately preceding the date of the filing of the petition"

²⁹351 N.E.2d 902 (Ind. Ct. App. 1976).

³⁰*Id.* at 903.

³¹*Id.* at 902-03.

The court of appeals held that the natural mother's due process rights had been violated by the court's order dispensing with her consent, which in effect permanently terminated her parental rights without adequate notice. Similar due process questions had been raised and rejected in two other third district cases, *In re Perkins*³² and *In re Wardship of Bender*.³³ However, in both of those proceedings, the parents were notified that the welfare department sought to have the children removed from parental custody and made wards of the department "for all purposes including adoption."³⁴ The court held in each case that this constituted adequate notice that termination of parental rights was at issue. In *Egan*, on the other hand, there was no reference either to termination of parental rights or to adoption in the documents served on the mother, and termination had not clearly been put in issue at the hearing.

4. *Rights of Putative Fathers.*—The Indiana legislature has amended the adoption statutes to add a new section permitting, but not requiring, a hearing to be held in cases where the putative father of an illegitimate child has "failed or refused to consent to the adoption of the child" or in proceedings to terminate the putative father's parental rights.³⁵ This is evidently an attempt by the legislature to deal with the questions concerning rights of unwed fathers, which were raised (but not answered) by the United States Supreme Court in *Stanley v. Illinois*.³⁶

In *Stanley*, the Supreme Court relied on both the due process

³²352 N.E.2d 502 (Ind. Ct. App. 1976).

³³352 N.E.2d 797 (Ind. Ct. App. 1976).

³⁴*In re Perkins*, 352 N.E.2d at 506; *In re Wardship of Bender*, 352 N.E.2d at 800.

³⁵IND. CODE § 31-3-1-6.1 (Supp. 1977), as amended by Pub. L. No. 307, 1977 Ind. Acts 1398. The amendment became effective May 1, 1977; it provides:

In cases where the putative father of an illegitimate child has failed or refused to consent to the adoption of the child or terminate his parental rights as provided in section 7 of this chapter, the court may, at the request of any person having a legitimate interest in the matter, including the licensed child placing agency sponsoring the adoption of such child, conduct a hearing on any objections which the putative father has to the adoption of the child. Notice of the hearing shall be given to the putative father, and such notice and hearing shall satisfy fully the requirements of section 6(h) of this chapter with respect to putative fathers. At the hearing the court may determine the merits of any objections to the adoption or claims regarding the child to be adopted made by the putative father. If the putative father fails to make objections to the adoption of the child at the hearing, he shall be foreclosed from challenging or objecting to the adoption of the child at any later date. Failure of the putative father to appear after proper notice shall be tantamount to failure to object, and the court may make its determination accordingly.

³⁶405 U.S. 645 (1972).

and equal protection clause of the fourteenth amendment³⁷ to hold that the natural father of illegitimate children was entitled to a hearing on his fitness as a parent before his children could be taken from his custody. The case concerned the validity of an Illinois statutory presumption that unwed fathers were unfit parents. The immediate issue was custody of the children rather than adoption; however, the Court's decision has far-reaching implications in adoption and termination proceedings. If due process requires that an unwed father be given a hearing before his *custody* rights can be adjudicated, then due process must also require notice and an opportunity to be heard before *all* of his parental rights can be finally terminated in an adoption or termination proceeding. Once the existence of the unwed father's parental rights is recognized, the law can no longer summarily dispose of them, as the Illinois courts had attempted to do in *Stanley* or as the Indiana adoption statutes do in dispensing with the necessity for his consent to adoption.³⁸ Consent to adoption, which amounts to a permanent relinquishment of all parental rights, is a far more serious and irreversible step than is a change in custody. The logic of *Stanley*, though not its holding, requires notice and a hearing before a putative father's rights can be finally terminated.

The practical problems this requirement raises in the context of adoption are enormous. It is still a fairly rare phenomenon for an unwed father to assert his parental rights, as *Stanley* did. The financial and other burdens of parenthood being what they are, most unwed fathers may still prefer to remain anonymous, even where the child is being put up for adoption. Any requirement that a putative father must give his consent before an illegitimate child can be adopted might well have the effect of preventing or delaying the adoption of many such children, a result hardly in keeping with the law's often stated concern for the child's best interests. The legislature has declined to take this alternative, leaving intact the existing provision of the adoption statutes that dispense with the putative father's consent. Instead, it has enacted the present amendment, which authorizes a court, at the request of any interested person, to conduct a hearing on any objections the non-consenting putative father may have to the adoption. If the putative father fails

³⁷U.S. CONST. amend. XIV, § 1.

³⁸IND. CODE § 31-3-1-6(g)(2) (1976). For a general discussion of the question, see Schafrick, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L. Q. 75 (1973). A Supreme Court decision handed down January 10, 1978, contains some clarification of the substantive rights of unwed fathers, but should not affect the *Stanley* notice and hearing requirements, since the father had been afforded a full hearing on his claims of parental rights. *Quilloin v. Walcott*, 98 S. Ct. 549 (1978).

to object to the adoption or fails to appear at the hearing after proper notice, he is foreclosed from raising objections later and from challenging the validity of the adoption.³⁹ The evident purpose of these provisions is to benefit both the child and its adopting parents by protecting the validity and finality of adoptions against any later attempt by a non-consenting father to assert his *Stanley* rights.

B. *Dissolution of Marriage*

1. *Antenuptial Agreements.*—In *Tomlinson v. Tomlinson*,⁴⁰ the Second District Court of Appeals held that antenuptial agreements providing for the disposition of property in the event of divorce are not invalid *per se* as against public policy and that the particular agreement involved was neither a contract that promoted divorce, nor voidable for concealment, fraud, or duress. The agreement, however, was held not to be binding on the trial court but was merely one factor for the court to consider in making an equitable distribution of the parties' property.⁴¹ Thus, the holding of this case goes no farther than the First District Court of Appeals' 1975 holding in *Flora v. Flora*,⁴² but *Tomlinson* does contain an extensive discussion of the policies underlying previous decisions invalidating such agreements and indicates the court's support for a much broader rule of validation than would have been required by the facts of this case.

The agreement involved in *Tomlinson* provided only that if there were a divorce, the wife would have no claim to share in certain specified property—a residence and a real estate company—owned by the husband prior to the marriage. It did not involve any limitation on the husband's duties of support, which was the factor held to invalidate the antenuptial agreement in the 1906 case of *Watson v. Watson*.⁴³ The court could have merely distinguished the *Tomlinson* agreement from that involved in *Watson*, but it preferred to rest its decision on the broad policy grounds expressed in recent cases from other jurisdictions.⁴⁴ There is extensive quotation from a recent Illinois case, *Volid v. Volid*,⁴⁵ discussing the changing roles of men and

³⁹IND. CODE § 31-3-1-6.1 (Supp. 1977).

⁴⁰352 N.E.2d 785 (Ind. Ct. App. 1976).

⁴¹*Id.* at 791. This treatment is justified on the ground that circumstances may have changed substantially since the agreement was signed. Nothing in the Dissolution of Marriage Act requires a court to approve *any* agreement of the parties, whether made before or during the marriage. See IND. CODE § 31-1-11.5-10(b) (1975).

⁴²337 N.E.2d 846 (Ind. Ct. App. 1976).

⁴³37 Ind. App. 548, 77 N.E. 355 (1906).

⁴⁴*Posner v. Posner*, 257 So. 2d 530 (Fla. 1972); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950) (dissenting opinion); *accord*, *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

⁴⁵6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

women in modern society and the increasing incidence of divorce and remarriage by older persons with established families and independent means. The quoted conclusion from *Volid* was that no public policy is violated by permitting such persons to establish their rights by contract so long as the contract is made with full disclosure and without fraud or duress.⁴⁶ It is clear from this dicta in *Tomlinson* that the court would favor a broad rule upholding an otherwise valid antenuptial agreement, even if it limited or eliminated altogether the obligation of either spouse to support the other in the event of divorce (support obligations being no longer imposed solely on the husband, as they were when *Watson* was decided).⁴⁷

2. *Financial Awards.*—During the survey period the appellate courts were still deciding cases involving alimony and property divisions made under former divorce statutes.⁴⁸ These decisions have little relevance to cases arising under the present Dissolution of Marriage Act⁴⁹ and will not be discussed. However, several cases were decided under the Dissolution of Marriage Act, and these may throw some light on the way the courts will be interpreting its various provisions with respect to maintenance and property divisions (the term "alimony" does not appear in the Act).

(a) *Maintenance.*—The scope of the limitations on maintenance awards found in section 9(c) of the Dissolution of Marriage Act was not precisely defined in any of the cases decided during the survey period.⁵⁰ Section 9(c) limits maintenance awards to cases where either spouse is "physically or mentally incapacitated."⁵¹ In *Newman v. Newman*,⁵² the husband was totally disabled by multiple sclerosis and confined to a wheelchair, thus section 9(c) was clearly applicable.

⁴⁶352 N.E.2d at 789-90 (quoting *Volid v. Volid*, 6 Ill. App. 3d 386, 391-93, 286 N.E.2d 42, 46-47 (1972)).

⁴⁷IND. CODE §§ 31-1-11.5-9, -10, -12 (1976).

⁴⁸Stanford v. Stanford, 352 N.E.2d 93 (Ind. Ct. App. 1976); Wilson v. Wilson, 349 N.E.2d 277 (Ind. Ct. App. 1976) (attorney's fees); Burkhardt v. Burkhardt, 349 N.E.2d 707 (Ind. Ct. App. 1976) (property division and attorney's fees).

⁴⁹IND. CODE §§ 31-1-11.5-1 to -24 (1976). *Stanford* contains an express disclaimer to this effect. 352 N.E.2d at 93 n.1.

⁵⁰The First District Court of Appeals did address this question in a case decided July 28, 1977, which is not within the period covered by this survey. *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977).

⁵¹IND. CODE § 31-1-11.5-9(c) (1976), which provides:

(c) The court may make no provision for maintenance except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court may make provision for the maintenance of said spouse during any such incapacity, subject to further order of the court.

⁵²355 N.E.2d 867 (Ind. Ct. App. 1976).

Although the trial court made no present award of maintenance to the husband, it did recognize his right to maintenance and expressly reserved jurisdiction over the question of possible future maintenance for the husband in its decree.⁵³

The husband was not contesting the court's failure to award him maintenance, but objected to the property division, which awarded substantially all of the property to the wife, who had received custody of the parties' three children. The Second District Court of Appeals held that this property division was not an abuse of discretion in view of the limited earning capacity of the wife and the express reservation of the issue of possible future maintenance for the husband, which the court considered a "proper and wise exercise of the power" granted by section 9(c).⁵⁴ The court commented that this section, which authorized awards of support for disabled spouses that are modifiable in the future, allows the courts greater flexibility in providing for such spouses' future needs than did the former statute under which a present lump sum alimony award had to be made sufficient to take care of the unknown future needs of the disabled spouse. Such awards were often weighted in favor of the future needs of the disabled spouse to the disadvantage of the paying spouse.⁵⁵

*In re Marriage of Lewis*⁵⁶ involved an order for temporary maintenance to a wife who was not incapacitated under section 9(c). The trial court entered its decree dissolving the marriage on December 13, 1974, but reserved decision on the question of property division. Its property division decree, handed down February 26, 1975, ordered the husband to pay \$160 per week for the wife's maintenance for the interim period. In reversing this portion of the court's order, the Third District Court of Appeals made it clear that section 7 of the Act authorizes temporary maintenance (to either spouse) *only* up to the date of the final decree dissolving the marriage, which in this case was December 13, 1974.⁵⁷ The fact that the

⁵³The decree provided:

Donald Newman is permanently disabled and unable to earn a living. The court retains continuing jurisdiction over the issue of possible maintenance to be paid by Gretchen Newman to Donald Newman, and such matter will be considered upon future hearing at the request of Donald Newman.

Id. at 869.

⁵⁴*Id.* at 870.

⁵⁵*Id.* at 869.

⁵⁶360 N.E.2d 855 (Ind. Ct. App. 1977).

⁵⁷IND. CODE § 31-1-11.5-7 (1976) provides in pertinent part:

(a) In any action pursuant to section 3 either party may make a motion for temporary maintenance

. . . .

trial court had taken the property division question under advisement did not alter the finality of the December decree as to the parties' marital status.

(b) *Property Division.* — Under the Dissolution of Marriage Act, as under the former divorce statutes, separation agreements settling the property rights of the parties are recognized and encouraged;⁵⁸ but in order for such an agreement to be approved by the court and incorporated into a dissolution of marriage decree, it must be in writing.⁵⁹ Interpreting section 10 of the Act, the First District Court of Appeals held that an *oral* property settlement agreement could not be approved and incorporated into the decree but that it could be considered by the trial court in making its own equitable division of property. This is what the trial court did, in effect, in *Waitt v. Waitt*,⁶⁰ and the court of appeals affirmed the decree incorporating the terms orally agreed upon by the parties. Reversal would be justified only by showing that the trial court had failed to consider the factors listed in section 11 of the Act, which are to be considered in determining a "just and reasonable" division of property;⁶¹ no such showing had been made in *Waitt*.

- (d) The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper
- (e) . . . [A]nd it [the order] shall terminate when the final decree is entered

(Emphasis added).

⁵⁸Compare *id.* § 31-1-11.5-10 with ch. 120, § 2, 1949 Ind. Acts 312 (repealed 1973).

⁵⁹IND. CODE § 31-1-11.5-10(a) (1976) provides:

To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, *the parties may agree in writing* to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them and the custody and support of their children.

(Emphasis added).

⁶⁰360 N.E.2d 268 (Ind. Ct. App. 1977).

⁶¹IND. CODE § 31-1-11.5-11 (1976) provides in pertinent part:

In determining what is just and reasonable the court shall consider the following factors:

- (a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as a homemaker;
- (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
- (c) the economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;
- (d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
- (e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

In *Covalt v. Covalt*,⁶² there was a written property settlement, which was approved and incorporated into the dissolution of marriage decree. The problem arose when the wife filed a motion for relief from the decree under Trial Rule 60(B)(8), seventy-six days after the decree had been entered. The trial court, after a hearing, granted her motion, amended the decree, and awarded the wife an additional \$5,000. The Second District Court of Appeals held the amendment "clearly erroneous" and reversed.⁶³ The wife's motion for relief from the decree was based on allegations that she had been without counsel at the time the agreement was made and that she had been misled by representations made by her husband and his attorney concerning the value of the house that was to become property of the husband under the parties' agreement. As a result, she had later agreed to relinquish her right to \$5,000 in cash under the agreement, a sum which represented, at least in part, her share of the parties' equity in the house. It was this \$5,000 that the trial court ordered restored to her in granting her motion for relief.

Since the wife's motion was based on alleged misrepresentations made to her, it was in substance grounded on an allegation of fraud, or constructive fraud, although brought under Trial Rule 60(B)(8), which authorizes relief for "any other reason justifying relief from the operation of the judgment," rather than under the fraud provision of Trial Rule 60(B)(3). The court of appeals' holding that there was insufficient evidence of fraud, actual or constructive, to support the trial court's judgment may have been all that was needed to dispose of this case. The court's further holding that the provisions of sections 10(c) and 17(a) of the Dissolution of Marriage Act limit the remedies available under Trial Rule 60(B) might well have been reserved for future decision in a more appropriate case.

Section 10(c) provides that property division provisions of a decree incorporating an agreement of the parties may not be subsequently modified by the court unless the agreement itself provides for modification or the parties subsequently consent to modification.⁶⁴ Section 17(a) provides that court orders "as to property division . . . may not be revoked or modified, *except in cases of fraud*," distinguishing such provisions from child support provisions, which are always subject to future modification or revocation on a showing of substantial change in circumstances.⁶⁵ It was the court's opinion in

⁶²354 N.E.2d 766 (Ind. Ct. App. 1976).

⁶³*Id.* at 771. (Judge White dissented, without opinion.)

⁶⁴IND. CODE § 31-1-11.5-10(c) (1976).

⁶⁵*Id.* § 31-1-11.5-17(a). The pertinent portions of this section provide:

(a) Provisions of an order with respect to child support may be modified or revoked. Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms

Covalt that these two sections limit a trial court's power to grant relief from the property division provisions of a dissolution decree under Trial Rule 60(B), because to grant such relief would be to modify the provisions in violation of sections 10(c) and 17(a). Under *Covalt*, the *only* ground available for relief from a property division decree would be fraud.⁶⁶

It seems imprudent to so limit the equitable powers of courts to relieve parties from the effects of an oppressive judgment, based on statutory provisions relating to *modifications* of such judgments. The kind of modification referred to in sections 10(c) and 17(a) is made on the basis of *future* changes in circumstances. Relief from a judgment, on the other hand, is granted for conditions existing *at the time the judgment was entered*, such as fraud, mistake, surprise, or newly discovered evidence.⁶⁷ These are two fundamentally different concepts, and there is no reason to conclude that the legislature, when it limited future modification of property division decrees by sections 10(c) and 17(a), intended to also foreclose equitable relief from such decrees where it would otherwise be justified on the limited grounds specified in Trial Rule 60(B). Suppose, for example, that a decree were based upon a property settlement agreement made by the parties under a mutual mistake of fact sufficiently material to justify rescinding the agreement under the usual rules relating to equitable rescission of contracts. Nothing in the Dissolution of Marriage Act justifies the conclusion that the legislature intended to deprive the courts of power to relieve the parties from such a decree under Trial Rule 60(B)(8), yet that would seem to be the result under *Covalt*.

3. *Child Custody.*—(a) *Original Custody Decrees.*—Two cases were decided by the First District Court of Appeals in which the trial courts' determinations of custody on dissolution of marriage were directly challenged.⁶⁸ In each case, custody had been awarded to the father; and in each, the trial court's determination of custody was affirmed on appeal.

In *Schwartz v. Schwartz*,⁶⁹ the wife challenged the award on the ground that the court should give preference to the wife and award her custody if it finds that she is a fit and proper person to have

unreasonable. *The orders as to property disposition entered pursuant to section 9 may not be revoked or modified except in cases of fraud which ground shall be asserted within two (2) years of said order.*

(Emphasis added).

⁶⁶Fraud is one of the grounds for relief under IND. R. TR. P. 60(B).

⁶⁷*Id.*

⁶⁸*Farley v. Farley*, 359 N.E.2d 583 (Ind. Ct. App. 1977); *Schwartz v. Schwartz*, 351 N.E.2d 900 (Ind. Ct. App. 1976).

⁶⁹351 N.E.2d 900 (Ind. Ct. App. 1976).

custody. In this case, the wife had adopted the husband's child from a prior marriage, and the court of appeals held she had the same rights to custody as a natural parent would have.⁷⁰ However, those rights do not include any preference with respect to custody under section 21(a) of the Dissolution of Marriage Act, which provides: "(a) The court shall determine custody and enter a custody order in accordance with the best interests of the child. *In determining the best interests of the child, there shall be no presumption favoring either parent*"⁷¹ The italicized portion was added to the Uniform Act's custody provision⁷² by the Indiana legislature. Its effect is to emphasize, rather than to alter, the intent of the Uniform Act to make the interests of the child, rather than those of the parents, the predominant consideration in custody decisions. Rejection of any preference based on sex is also probably required by the reasoning of recent Supreme Court equal protection decisions in the area of sex discrimination.⁷³ Based on the evidence presented in *Schwartz*, the court of appeals held the award of custody to the father was not an abuse of the trial court's discretion.

*Farley v. Farley*⁷⁴ involved a somewhat more complex fact situation in which the wife had left the state after filing her dissolution action, taking the parties' infant son with her. The wife was not present at the dissolution hearing, although she had notice of it; her attorney did appear and attempted unsuccessfully to have the proceedings dismissed or continued. The wife had filed another action for dissolution and custody in Texas, where she was then living with her parents. The Indiana trial court proceeded with the hearing, dissolved the marriage, and awarded custody to the husband. The wife, through her counsel, attempted to amend the judgment and to stay its enforcement, again without success. On appeal, the First District Court of Appeals affirmed the actions of the trial court.

In refusing to overturn the trial court's custody decision, the court of appeals emphasized the broad discretion courts necessarily have in such matters and the fact that appellate review is limited to the question of abuse of that discretion.⁷⁵ The wife's failure to ap-

⁷⁰IND. CODE § 31-3-1-9 (1976) provides in pertinent part: "After such adoption such adopting father or mother or both shall occupy the same position toward such child that he, she or they would occupy if the natural father or mother or both, and shall be jointly and severally liable for the maintenance and education of such person."

⁷¹*Id.* § 31-1-11.5-21(a) (emphasis added).

⁷²UNIFORM MARRIAGE AND DIVORCE ACT § 402.

⁷³See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁷⁴359 N.E.2d 583 (Ind. Ct. App. 1977).

⁷⁵See, e.g., *Gilchrist v. Gilchrist*, 225 Ind. 367, 75 N.E.2d 417 (1947) (habeas corpus action); *Shaw v. Shaw*, 304 N.E.2d 536 (Ind. Ct. App. 1973).

pear and testify at the hearings and her direct violation of a prior court order prohibiting removal of the child from the jurisdiction were factors the court was entitled to consider in making its custody determination, along with evidence of the husband's willingness and ability to care for the child.⁷⁶ The wife's presentation, through her attorney, of a letter from her physician advising against travel because of her pregnancy and of affidavits from her grandmother and great aunt attesting to her fitness as a mother did not require the trial court to grant her relief from the judgment under Trial Rule 60(B)(8).⁷⁷

(b) *Custody Modification.*—The First District Court of Appeals also decided two custody modification cases⁷⁸ in which custody had been awarded to the father and a third case in which the father's petition for change of custody was held to have been erroneously dismissed.⁷⁹

The first of these decisions, *Franklin v. Franklin*,⁸⁰ discussed the standards to be used in custody modification cases under the Dissolution of Marriage Act and concluded that these standards do not differ significantly from those used under prior statutes. In adopting the present statute, which is based on the Uniform Marriage and Divorce Act, the legislature omitted the section dealing with modification of custody decrees from the Indiana version.⁸¹ This omission left the Indiana statute with no explicit statement of the standards to be used in determining custody modification, but the general provisions relating to standards for determining custody in accordance with the best interests of the child were held relevant to modification as well as to the original determination of custody.⁸² The statute also specifically authorizes the court to interview the

⁷⁶359 N.E.2d at 589.

⁷⁷*Id.* at 586. The issue raised in *Farley* as to the effect of the automatic dismissal provisions of section 9(a) of the Dissolution of Marriage Act is discussed *infra* at 168, under 4. *Procedure*.

⁷⁸*In re Marriage of Lopp*, 362 N.E.2d 492 (Ind. Ct. App. 1977); *Franklin v. Franklin*, 349 N.E.2d 210 (Ind. Ct. App. 1976).

⁷⁹*Pund v. Pund*, 357 N.E.2d 257 (Ind. Ct. App. 1976).

⁸⁰349 N.E.2d 210 (Ind. Ct. App. 1976).

⁸¹UNIFORM MARRIAGE AND DIVORCE ACT § 409.

⁸²IND. CODE § 31-1-11.5-21(a) (1976). The statute lists the following factors to be considered in determining the child's best interests:

- (1) the age and sex of the child;
- (2) the wishes of the child's parent or parents;
- (3) the wishes of the child;
- (4) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (5) the child's adjustment to his home, school and community; and
- (6) the mental and physical health of all individuals involved.

child in chambers to ascertain the child's wishes.⁸³ The court of appeals held in *Franklin* that these statutory provisions did not change the requirement of prior case law that a change in conditions must be shown before a court can modify a custody decree.⁸⁴ In both *Franklin* and *In re Marriage of Lopp*,⁸⁵ the court held there was sufficient evidence of changed conditions to justify the trial court's exercise of its discretion to modify its prior custody decree and award custody to the father.

In *Pund v. Pund*,⁸⁶ the father filed his petition for change of custody in the Dubois Circuit Court, although the original 1974 dissolution decree awarding custody of the parties' two daughters to the mother had been entered in the Spencer Circuit Court. At the time the father's petition for change of custody was filed, all of the parties were residents of Dubois County. The mother's motion to dismiss for lack of subject matter jurisdiction was granted by the trial court, but the First District Court of Appeals reversed, holding that the Dubois Circuit Court did have subject matter jurisdiction over the custody issue. At most, the issue of whether the case should be tried in Spencer or Dubois County was a question of venue, and the proper remedy would have been an order transferring the case under Trial Rule 75(B), rather than an order dismissing the case.

As in *Franklin*, the absence of a specific provision relating to custody modification proceedings in the Indiana Dissolution of Marriage Act was the source of the problem faced by the trial court in *Pund*. Section 3 of the Act refers to only two causes of action, dissolution of marriage and child support.⁸⁷ Section 20 states that a child custody proceeding can be commenced by a parent "by filing a petition pursuant to section 4(a) or (b),"⁸⁸ but section 4 describes only the same two types of proceedings, dissolution and child support.⁸⁹ The section of the Uniform Act dealing with child custody pro-

⁸³*Id.* § 31-1-11.5-21(d).

⁸⁴*E.g.*, *Rose v. Rose*, 256 Ind. 440, 269 N.E.2d 365 (1971); *Huston v. Huston*, 256 Ind. 110, 267 N.E.2d 170 (1971); *Perdue v. Perdue*, 254 Ind. 77, 257 N.E.2d 827 (1970). *Rose* states the requirement to be "a substantial and material change in conditions affecting the welfare of the children." 256 Ind. at 443, 269 N.E.2d at 366.

A 1976 amendment to IND. CODE § 31-1-11.5-22(d) added a requirement that custody orders be modified "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable." Pub. L. No. 128, §4(d), 1976 Ind. Act 616, 619.

⁸⁵362 N.E.2d 492 (Ind. Ct. App. 1977).

⁸⁶357 N.E.2d 257 (Ind. Ct. App. 1976).

⁸⁷IND. CODE § 31-1-11.5-3 (1976).

⁸⁸*Id.* § 31-1-11.5-20.

⁸⁹*Id.* § 31-1-11.5-4.

ceedings,⁹⁰ as well as that dealing with custody modification, were omitted from the Indiana Act, leaving it without any express provisions for a child custody action *not* connected with a dissolution or child support action.⁹¹ In *Pund*, the court of appeals had to look to the general statutes that established the circuit courts and gave them jurisdiction over "actions for divorce"⁹² to support its determination that the trial court had subject matter jurisdiction in this case.

These omissions in the Indiana Dissolution of Marriage Act have now been corrected by adoption of the Uniform Child Custody Jurisdiction Law,⁹³ which contains provisions both for original custody proceedings and modification proceedings.⁹⁴

(c) *Uniform Child Custody Jurisdiction Law.*—This statute, which was adopted in substantially unchanged form, does a great deal more than fill in some gaps in the Indiana Dissolution of Marriage Act. It is designed to minimize such problems as continual relitigation of custody, forum shopping by parents seeking a change in custody, child snatching, and jurisdictional competition with courts from other states. It also attempts to promote cooperation and exchange of information between courts of different states concerned with the same custody dispute.⁹⁵ To achieve these purposes, the statute provides standards to determine when a court should assume jurisdiction of a custody dispute.⁹⁶ It sets up procedures to assist in resolving conflicts of jurisdiction where a court in another state is also entitled to assume jurisdiction, essentially by the simple expedient of "communication" and exchange of information between the two courts, with a view to determining which is the more appropriate forum.⁹⁷ The law provides for enforcement of out-of-state decrees rendered by courts meeting the jurisdictional requirements of the statute,⁹⁸ for cooperation between courts in forwarding transcripts and other evidence, and for cooperation in ordering persons within a court's jurisdiction to appear in custody

⁹⁰UNIFORM MARRIAGE AND DIVORCE ACT § 401.

⁹¹Ironically, § 20 does provide that a child custody proceeding can be commenced by a "person other than a parent," but that provision would not apply to the father's petition in *Pund*. IND. CODE § 31-1-11.5-20 (1976).

⁹²*Id.* § 33-4-4-3. The Indiana Dissolution of Marriage Act also gives the circuit courts jurisdiction to "enter dissolution decrees," but the language of the above statute is broader. *Id.* § 31-1-11.5-2(a).

⁹³*Id.* §§ 31-1-11.6-1 to -24 (Supp. 1977) (originally enacted as Pub. L. No. 305, § 4, 1977 Ind. Acts 1383). The Act became effective August 1, 1977.

⁹⁴IND. CODE § 31-1-11.6-3 (Supp. 1977).

⁹⁵*Id.* § 31-1-11.6-1.

⁹⁶*Id.* § 31-1-11.6-3.

⁹⁷*Id.* § 31-1-11.6-7.

⁹⁸*Id.* § 31-1-11.6-13.

proceedings in another state.⁹⁹ At least twenty states, in addition to Indiana, have adopted the Uniform Child Custody Jurisdiction Law.¹⁰⁰

4. *Procedure.*—Two court of appeals decisions have been handed down interpreting section 8(a) of the Dissolution of Marriage Act, which provides for automatic dismissal of the action if no motion for dissolution of the marriage is filed by either party within ninety days after a continuance has been granted for reconciliation purposes.¹⁰¹

In *Bennett v. Bennett*,¹⁰² the dissolution action had been initiated by the husband. After the final hearing, held November 12, 1974, the trial court ordered the matter continued and directed the parties to seek reconciliation through Lutheran Family Services. A month later, the agency reported that neither party felt reconciliation was possible. On April 29, 1975, more than five months after the final hearing, the husband requested a further hearing. Both parties appeared at this hearing and a decree of dissolution was entered on June 23, 1975. After the decree was entered, the wife raised the issue of automatic dismissal under section 8(a) for the first time in her motion for relief from judgment and motion to correct errors. The Third District Court of Appeals held the wife had waived the issue of automatic dismissal by failing to raise it until after the dissolution decree was entered, rejecting her argument that section 8(a) was "jurisdictional."

The wife's contention was, in effect, that upon the expiration of ninety days from the date of continuance, the court's jurisdiction

⁹⁹*Id.* § 31-1-11.6-20.

¹⁰⁰It was reported in [1977] 3 FAM. L. REP. 1181 (BNA) that the following states had adopted the Uniform Act: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Wisconsin, and Wyoming.

¹⁰¹IND. CODE § 31-1-11.5-8(a) (1976) provides:

(a) In an action pursuant to section 3(a) [dissolution of marriage], a final hearing shall be conducted no earlier than sixty (60) days after the filing of the petition. Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree as provided in section 9(a) or if the court finds that there is a reasonable possibility of reconciliation, the court *may continue the matter and may order the parties to seek reconciliation* through any available counseling. At any time forty-five (45) days after the date of the continuance either party may move for the dissolution of the marriage and the court may enter a dissolution decree as provided in section 9(a). *If no motion for the dissolution is filed, the matter shall be, automatically and without further action by the court, dismissed after the expiration of ninety (90) days from the date of continuance.*

(Emphasis added).

¹⁰²361 N.E.2d 193 (Ind. Ct. App. 1977).

over the subject matter "automatically" terminated under section 8(a) so that any proceedings held thereafter, including issuance of the dissolution decree, were void. However, the court of appeals declined to construe section 8(a) as having so drastic an effect, holding instead that the legislature adopted the automatic dismissal provision merely as a "procedural vehicle . . . to aid the efficient housekeeping of the court," similar in effect to a statute of limitations.¹⁰³ Being procedural rather than jurisdictional, it could be waived by a party's participation without objection in the dissolution proceedings, as the wife did in this case.

The automatic dismissal provision was also raised by the wife in *Farley v. Farley*,¹⁰⁴ but the facts of this case were not such as to make the provision applicable. The section provides for automatic dismissal only where the court exercises its power to continue the matter *after final hearing* so that the parties can seek reconciliation. The automatic dismissal occurs if, ninety days after such a continuance, neither party has moved for dissolution. In *Farley*, the reconciliation attempts had occurred *before* any final hearing had been held. Even though more than a year had passed since the filing of the petition for dissolution,¹⁰⁵ no final hearing had occurred to start the ninety-day period running. Under these facts, the First District Court of Appeals held that the automatic dismissal provisions of section 8(a) were inapplicable.

In *State ex rel. Stanton v. Superior Court*,¹⁰⁶ the Indiana Supreme Court made a temporary writ of mandate and prohibition issued against the Superior Court of Lake County permanent. The writ directed the court to vacate an order joining the administrators of the state and county departments of public welfare as additional parties to a dissolution of marriage proceeding, and to vacate an order restraining the administrators from denying to the wife any benefits to which she would be entitled if she were unmarried. The joinder order was entered by the superior court *sua sponte* on learning that the husband's purpose in filing the dissolution action was to make his disabled wife eligible for medicaid benefits.¹⁰⁷ The supreme court held that the joinder was improper under Trial Rule 19(A)(2)¹⁰⁸ since the welfare administrators claimed no interest in the pro-

¹⁰³*Id.* at 196.

¹⁰⁴359 N.E.2d 583 (Ind. Ct. App. 1977). Other aspects of this case are discussed *supra* at 163, under *3. Child Custody*.

¹⁰⁵The parties filed separate actions for dissolution on June 6, 1974. The final hearing was held September 19, 1975. *Id.* at 584-85.

¹⁰⁶355 N.E.2d 406 (Ind. 1976).

¹⁰⁷*Id.* at 407.

¹⁰⁸IND. R. TR. P. 19(A)(2) provides:

A person . . . shall be joined as a party in the action if

. . . .

ceeding, and nothing in the Dissolution Act contemplated the joinder of such additional parties in an action to dissolve a marriage.

C. Enforcement of Alimony and Support Judgments

The appellate courts of Indiana decided several cases relating to enforcement of money judgments awarded in connection with divorce. The cumulative effect of these decisions may be to limit the remedies available for enforcement of decrees ordering payment of periodic sums regardless of their denomination as alimony, maintenance, property division, or child support.

1. *Contempt*.—In a divided decision, *State ex rel. Shaunki v. Endsley*,¹⁰⁹ the Indiana Supreme Court held that a judgment for installment payments awarded as a division of property is not enforceable by contempt proceedings. Although the issue on appeal was precisely, and correctly, defined as "whether payment of a judgment awarded in lieu of property division and payable in weekly installments, is enforceable by contempt proceedings,"¹¹⁰ throughout the majority opinion there are references to enforcement of an "alimony judgment." Since the decree here sought to be enforced was rendered under the present Indiana Dissolution of Marriage Act,¹¹¹ in which the word "alimony" does not appear, such references are at best confusing. Many alimony judgments rendered under previous statutes are still in effect, and they should not be so casually equated with property divisions entered under the Dissolution of Marriage Act without consideration being given to the substantial differences between the present and former statutes. In fact, the rule applied in *Shaunki* came into existence more than seventy years ago under statutes significantly different from statutes that have been in effect in more recent years.

The *Shaunki* majority cited and followed a 1904 case, *Marsh v. Marsh*,¹¹² which held that an award of alimony in gross (for a fixed sum), though payable in installments, could not be enforced by con-

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

- (a) as a practical matter impair or impede his ability to protect that interest or
- (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

¹⁰⁹362 N.E.2d 153 (Ind. 1977) (Justices Arterburn and DeBruler dissented).

¹¹⁰*Id.* at 153.

¹¹¹IND. CODE § 31-1-11.5-1 to -24 (1976). The decree was entered December 3, 1976, dissolving the Shaunkis' marriage on the present statutory ground of irretrievable breakdown of the marriage. *In re Marriage of Shaunki*, No. C 75-1531 (Marion Cir. Ct. Dec. 3, 1976).

¹¹²162 Ind. 210, 70 N.E. 154 (1904).

tempt. The reason given was that such an award—the only form of alimony permitted under the statute then in force¹¹³—was “to all intents and purposes a judgment, which may be collected on execution”; use of the “more drastic remedy” of contempt was therefore considered unnecessary.¹¹⁴ *Marsh* followed a long line of prior Indiana cases that had held a judgment for alimony to be “an absolute personal judgment, which is collected by execution as other judgments.”¹¹⁵ The statute in force at that time not only required a decree for alimony to be “for a sum in gross, and not for annual payments,” but gave the court discretion to allow payment by installments *only* if “sufficient surety” was given.¹¹⁶ Thus, under that statutory scheme, the *Marsh* court was justified in concluding that the wife was adequately protected both by the surety provision of the statute and by the ready availability of the execution remedy; therefore, use of the contempt power as a means of forcing compliance with the court’s alimony decree was not necessary.

The statutory scheme had changed dramatically by 1974, when the *Marsh* rule was applied in *State ex rel Schutz v. Marion Superior Court*.¹¹⁷ No longer was an alimony judgment an “absolute personal judgment” readily collectible by execution.¹¹⁸ The 1949 statute,¹¹⁹ in effect at the time of the decree sought to be enforced in *Schutz*, required neither a final judgment for a fixed and immutable sum, nor sufficient surety for a judgment payable in installments. Rather, it permitted installments to be discontinued or reduced on the death or remarriage of the wife and made the giving of any kind of security entirely discretionary with the court.¹²⁰ As Mr. Justice

¹¹³Ch. 43, § 22, 1873 Ind. Acts 107 (effectively repealed 1949).

¹¹⁴162 Ind. at 212, 70 N.E. at 155.

¹¹⁵*Musselman v. Musselman*, 44 Ind. 106, 122 (1873).

¹¹⁶This statute, in force at the time *Marsh* was decided, was identical to that quoted in *Musselman*. Ch. 43, § 22, 1873 Ind. Acts 112 (effectively repealed 1949); it states: “The decree for alimony to the wife shall be for a sum in gross, and not for annual payments; but the court, in its discretion, may give a reasonable time for the payment thereof, by installments, on sufficient surety being given.”

¹¹⁷261 Ind. 535, 307 N.E.2d 53 (1974).

¹¹⁸Recent court of appeals cases limiting the availability and effectiveness of execution as a remedy for enforcement of alimony judgments are discussed *infra* at 173.

¹¹⁹Ch. 120, § 3, 1949 Ind. Acts 312 (repealed 1973).

¹²⁰The pertinent portion of *id.* § 3, provided:

In determining the method of payment of alimony *the court may require that it be paid in gross or in periodic payments*, either equal or unequal, and if to be paid in periodic payments *the court may further provide for their discontinuance or reduction upon the death or remarriage of the wife*, and, *in his discretion, the court may further provide for such security, bond, or other guarantee as shall be satisfactory to the court for the purpose of securing the obligation to make such periodic payments*

(Emphasis added).

Arterburn's dissent in *Schutz* pointed out, the situation hardly called for automatic application of the seventy-year-old rule of *Marsh*, when the underlying reasoning of that rule had been completely eroded by subsequent changes in the divorce statutes.¹²¹ The *Schutz* majority attempted to shore up the deficiency of *Marsh* as precedent by reliance on the Indiana Constitution's prohibition of imprisonment for debt,¹²² but the changes in the nature of alimony under recent statutes and the limitations on the execution remedy discussed in the following section also tend to cast doubt on the court's characterization of alimony as "debt."¹²³

The statute in force when the *Schutz* decree was entered had been repealed and the present Dissolution of Marriage Act had been adopted by the time the *Shaunki* decree was entered.¹²⁴ The Dissolution of Marriage Act introduced new concepts as well as new terminology. In lieu of alimony, "maintenance" can now be awarded if a spouse is "physically or mentally incapacitated,"¹²⁵ or where the parties agree in writing.¹²⁶ Maintenance is of indefinite duration and subject to future modification by the court.¹²⁷ It clearly does not come within the holding of *Schutz* that "a specific sum of money provided in an alimony judgment is a judgment debt" within the defini-

In fact, the only security actually provided in the *Schutz* decree was beneficiary status on two life insurance policies, which would be effective as security only in the event of the husband's death. 261 Ind. at 536, 307 N.E.2d at 54.

¹²¹261 Ind. at 538-40, 307 N.E.2d at 55-56 (Arterburn, J., dissenting).

¹²²IND. CONST. art. 1, § 22. *Marsh* did not mention the constitutional provision.

¹²³Other states having similar constitutional provisions have found it to be inapplicable to alimony judgments. The rationale of these cases is summarized by Professor Clark, as follows:

It is well settled that the enforcement of alimony decrees by contempt does not violate the prohibition against imprisonment for debt found in many state constitutions. This is so even though the decree is based upon an agreement of the parties. Alimony is said not be a "debt" in the sense used in such provisions, but an obligation arising out of marriage. In addition the enforcement of alimony is so important to the state as to justify the use of imprisonment as a matter of policy where necessary to insure that the husband will perform his obligation. The purpose of the constitutional prohibition, which is to protect the honest debtor who is unable to pay his debts, can still be accomplished by adherence to the settled principle that inability to pay alimony is a defense to contempt proceedings.

H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

¹²⁴*In re Marriage of Shaunki*, No. C 75-1531 (Marion Cir. Ct. Dec. 3, 1976).

¹²⁵IND. CODE § 31-1-11.5-9(c) (1976), quoted in note 51 *supra*.

¹²⁶*Id.* § 31-1-11.5-10(a), quoted in note 59 *supra*.

¹²⁷The maintenance award to an incapacitated spouse is to be made only "during any such incapacity" and is "subject to further order of the court." *Id.* § 31-1-11.5-9. *Id.* § 31-1-11.5-10 authorizes the parties to agree in writing to provisions for maintenance, property division, and custody and support of children, and expressly limits modification of provisions for "disposition of property," but contains no such limitation on future modification of provisions for maintenance, custody, or child support.

tion of the Indiana constitutional provision that "there shall be no imprisonment for debt."¹²⁸ The provisions relating to property division give the trial court broad powers to divide property owned by either or both spouses, including property acquired prior to the marriage. In so doing, the court may take into account, among other factors, the "earnings and earning ability of the parties,"¹²⁹ a factor clearly more relevant to rights and duties of support than to a mere disentangling of the property interests of the parties.¹³⁰ The Dissolution of Marriage Act thus tends to blur the dividing line between awards labeled "maintenance" and those labeled "property division." The Act also contains an express provision authorizing enforcement of decrees entered in dissolution actions by contempt.¹³¹

On its facts, *Shaunki* holds only that a "judgment awarded *in lieu of* property division and payable in weekly installments"¹³² is not enforceable by contempt. The court might well have considered the changes in the Indiana divorce statutes and the general policies relating to enforcement of dissolution decrees by contempt before applying the *Marsh-Schutz* rule in *Shaunki*. These factors certainly should be considered before extending the rule to other types of financial awards under the Dissolution of Marriage Act, whether labeled as "maintenance" or "property division."

In *Kuhn v. Kuhn*,¹³³ the First District Court of Appeals stated that a second judgment fixing the amount of arrearage is necessary before a judgment for child support can be enforced by contempt. This case is discussed in the section which follows because of its

¹²⁸261 Ind. at 538, 307 N.E.2d at 55.

¹²⁹IND. CODE § 31-1-11.5-11 (1976).

¹³⁰A spouse's equitable interests in marital property generally extend only to property acquired by the parties during the marriage. See H. CLARK, LAW OF DOMESTIC RELATIONS § 14.8 (1968).

¹³¹IND. CODE § 31-1-11.5-17(a) (1976), the pertinent portion of which provides: "Terms of the [dissolution] decree may be enforced by all remedies available for enforcement of a judgment *including but not limited to contempt* except as otherwise provided in this chapter." (Emphasis added).

Under prior statutes, the Indiana courts had to rely on their inherent equity powers as authority for enforcement of decrees by contempt. See *Corbridge v. Corbridge*, 230 Ind. 201, 207, 102 N.E.2d 764, 767 (1952) (child support order).

¹³²362 N.E.2d at 153 (emphasis added). The decree sought to be enforced in *Shaunki* contained no findings relating to support factors. Rather it contained findings that the wife was entitled to a share of a business owned and operated by the husband, that the business could not be readily divided or sold, and that the wife "could best benefit by a cash settlement *in lieu of* a division of the business." Based on these findings, the court awarded the wife \$35,000, payable in installments, "in *lieu of* property division." *In re Marriage of Shaunki*, No. C 75-1531, slip op. at 2-5 (Marion Cir. Ct. Dec. 3, 1976).

¹³³361 N.E.2d 919 (Ind. Ct. App. 1977).

reliance on the rule announced in *Owens v. Owens*,¹³⁴ discussed therein.

2. *Execution.*—In *Owens v. Owens*,¹³⁵ the First District Court of Appeals held that execution was not available to enforce a judgment for child support until the amount of arrearages in support had been reduced to judgment in a "second suit."¹³⁶ The court of appeals affirmed the judgment of the trial court granting the defendant-husband's motion to quash a writ of execution against his property. The wife had previously filed a petition to reduce the support arrearages to judgment, which the trial court had denied. Although the court of appeals' holding seems to indicate that the trial court should have granted the wife's petition, the court held the wife had waived the issue by failing to file a motion to correct errors at the time her petition was originally denied. Moreover, the court said, the statute on which the petition was based had been repealed prior to the filing of her petition.¹³⁷ The repealed statute¹³⁸ permitted, but did not require, entry of a judgment for arrears in a contempt proceeding. Since the court of appeals held in *Owens* that entry of such a judgment is mandatory, despite the repeal of this statute, it is difficult to see the relevance of its repeal to the outcome of this case.

The wife relied on section 17(a) of the Dissolution of Marriage Act, which now provides that terms of a support decree "may be enforced by all remedies available for enforcement of a judgment, including but not limited to contempt"¹³⁹ It is at least arguable that repeal of the former statute specifically providing for a judgment for arrears and adoption of a statute providing in broad terms for enforcement of the original decree indicates a legislative intent to authorize direct enforcement of that decree without the necessity

¹³⁴354 N.E.2d 350 (Ind. Ct. App. 1976).

¹³⁵*Id.*

¹³⁶*Id.* at 352.

¹³⁷*Id.* The trial court dismissed the wife's Petition to Reduce Arrearages to Judgment on July 16, 1975. It granted the husband's motion to quash the writ of execution on September 17, 1975; at which time the wife orally moved to reinstate her petition; her motion was denied. *Id.* at 351-52.

¹³⁸Ch. 282, § 1, 1967 Ind. Acts 901 (repealed 1973). The repealed statute provided:

Whenever any person is determined by a court to be guilty of contempt for failure to comply with an order of that court to pay support for dependents and that court shall make a determination of the amount of an arrearage under such order, the amount of such arrearage so determined may be entered as a judgment of record against such person and be enforced in the same manner as provided for the enforcement and collection of money judgments.

(Emphasis added).

¹³⁹IND. CODE § 31-1-11.5-17(a) (1976).

of obtaining a second judgment for the amount in arrears.¹⁴⁰ Without discussing either policy or statutory construction, the court of appeals held in *Owens* that adoption of section 17(a) did not change "existing Indiana practice." The only reason given is that "otherwise, the person filing the praecipe [for execution] may state any given figure and place the burden upon the other party to prove that the amounts are incorrect."¹⁴¹

Indiana is not the only state requiring the docketing of a second judgment for arrears of alimony or child support before execution may issue. But in many other states that follow this practice, a judgment for alimony or child support can be modified up to the time the second judgment is entered, even as to amounts already in arrears (retroactive modification).¹⁴² In those states, the amount actually owed under such an order can never be finally determined until the judgment for arrears is docketed, and the requirement of a second judgment is "the logical corollary of the rule . . . that even arrears of alimony may be modified up to the time that the [second] judgment is docketed."¹⁴³ In Indiana, on the other hand, support judgments are not retroactively modifiable.¹⁴⁴ The amount of support due is fixed by the original decree, and, as to past-due installments, the only defense open to the obligor is the defense of payment.

Moreover, both the present and former statutes authorize the court to order that payments be made through the clerk of the circuit court, who is required to maintain a record of such payments.¹⁴⁵ Where this procedure is followed, there appears to be no reason at all to require the parent with custody to spend time and money in securing a second judgment, because the amount actually due is readily ascertainable. In other cases, the need to provide adequate support for children should outweigh any inconvenience to a parent who might have to prove that he (or she) had actually made the payments alleged to be due, especially when that parent could have

¹⁴⁰As a matter of policy, such a legislative intent would be entirely consistent with the intent expressed by the legislature in adopting the Uniform Reciprocal Enforcement of Support Act, which recognizes the importance of improving and extending the enforcement of duties of support. *Id.* § 31-2-1-1.

¹⁴¹354 N.E.2d at 352. Three cases are cited in support of the *Owens* holding, but in none of them was the necessity for a second judgment an issue. *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952); *Grace v. Quigg*, 150 Ind. App. 371, 276 N.E.2d 594 (1971); *Smith v. Smith*, 124 Ind. App. 343, 115 N.E.2d 217 (1953). *Quigg* did involve a judgment for arrears in support, but it was the *amount* of the arrears, not the necessity for a second judgment, which was at issue.

¹⁴²See H. CLARK, *LAW OF DOMESTIC RELATIONS* §§ 14.9, 14.10, 15.3 (1968).

¹⁴³*Id.* § 14.10.

¹⁴⁴*Zirkle v. Zirkle*, 202 Ind. 129, 172 N.E. 192 (1930); *see Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952).

¹⁴⁵IND. CODE § 31-1-11.5-13 (1976); *id.* §§ 31-2-2-1, -2.

protected himself by requesting that the payments be made through the court.

Owens is cited by the First District Court of Appeals in *Kuhn v. Kuhn*,¹⁴⁸ in support of a statement that a second judgment fixing the amount of arrearage is necessary before judgment for child support can be enforced by *contempt*, but resolution of this issue was not necessary in *Kuhn*. The three children involved were all emancipated before the contempt proceedings were brought, and under prior Indiana case law, contempt is not available as a remedy to enforce support orders after emancipation.¹⁴⁷ The trial court granted the defendant's motion for summary judgment on this ground, and its action was affirmed on appeal.¹⁴⁸ Since contempt was not available as a remedy in any event on the facts of this case, there was no reason for the court to decide whether one proceeding or two would be necessary to enforce a support order by contempt; if that question *had* been at issue here, there is even less reason for requiring two proceedings for contempt enforcement than there is for execution. Whereas in execution proceedings the obligor parent may be subjected to the inconvenience of having his property seized before he can contest the amount of the arrearage alleged to be due, in a contempt proceeding, he would normally be afforded a hearing on the court's order to show cause *before* any coercive action is taken against him.¹⁴⁹ No reason was given in *Kuhn* for rejecting the plaintiff-wife's contention that the trial court should have authority to reduce child support arrearages to judgment and enforce the judgment through contempt in the same proceeding. To require two proceedings for every delinquency, where one would serve as well, seems wasteful of both the courts' and the parties' time and serves no purpose other than delay in enforcing the children's right to support.

3. *Alimony as a Lien.*—*Owens* is also cited by the Third District Court of Appeals in support of its holding in *Uhrich v. Uhrich*¹⁵⁰ that an alimony judgment, payable in the future, does not constitute a lien on the obligor-husband's real estate. The judgment in question was for the gross sum of \$40,500, payable in 122 monthly installments. None of the installments was in default at the time the wife began her action to have the unpaid balance declared a lien on

¹⁴⁶361 N.E.2d 919 (Ind. Ct. App. 1977).

¹⁴⁷*Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952). This is in accord with the general rule. See Annot., 32 A.L.R.3d 888 (1970).

¹⁴⁸361 N.E.2d at 921.

¹⁴⁹This was the procedure followed in *State ex rel. Schutz v. Marion Superior Court*, 261 Ind. 535, 307 N.E.2d 53 (1974), discussed in the preceding section.

¹⁵⁰362 N.E.2d 1163 (Ind. Ct. App. 1977).

her former husband's real estate. The statute in force at the time the alimony judgment was rendered provided:

Said judgment [for alimony] shall be a lien upon the real estate and chattels real of the spouse liable therefor to the extent that it is payable immediately *but shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly.*¹⁵¹

The *Uhrich* decree did not expressly provide that the alimony judgment would constitute a lien.

The wife's argument was that the above statute constituted a limitation on the effect of an alimony judgment as a lien. She argued that repeal of the statute in 1973 removed the limitation, leaving alimony judgments subject to the provisions of the general lien statute that "all final judgments for the recovery of money or costs . . . shall be a lien upon real estate and chattels real liable to execution in the county where such judgment has been duly entered"¹⁵² The court of appeals, in a divided opinion, rejected this argument, holding that the general lien statute does not apply to an alimony judgment payable in futuro.¹⁵³ By citing *Owen* in support of this view, the majority implicitly held that the requirement of a second judgment for arrears applies to alimony judgments as well as to judgments for child support; therefore, the original alimony judgment, though for a gross sum, is not immediately due, payable, and enforceable by execution as ordinary money judgments are.¹⁵⁴

Presiding Judge Staton's dissent rejected this rationale and reasoned instead that repeal of the former provision by the legislature was a "clear expression of policy that alimony judgments should be treated as any other judgment."¹⁵⁵ He pointed out that the effect of the court's decision was to subordinate alimony judgments to later-acquired judgment liens. It would therefore require the alimony judgment-holder to obtain repeated executions as payments become due in order to protect the judgment, which would place an "insufferable hardship" on the judgment holder "as well as the judicial system which would have to process the repetitive executions."¹⁵⁶ It should be noted that under *Owens*, each of these

¹⁵¹Ch. 120, § 3, 1949 Ind. Acts 312 (repealed 1973) (emphasis added).

¹⁵²IND. CODE § 34-1-45-2 (1976).

¹⁵³362 N.E.2d at 1164 (opinion of Garrard, J.).

¹⁵⁴*Id.* Child support judgments have been held not to create liens under the general lien statute because they are subject to future modifications by the court and therefore are not final judgments for a specific sum of money. *Myler v. Myler*, 137 Ind. App. 605, 210 N.E.2d 446 (1965); *Rosenberg v. American Trust & Sav. Bank*, 86 Ind. App. 552, 156 N.E. 411 (1927).

¹⁵⁵362 N.E.2d at 1165 (Staton, J., dissenting).

¹⁵⁶*Id.*

repeated executions would involve entry of a separate judgment specifying the amount then in arrears.

The question presented in *Uhrich* is far from easy. It represents a direct conflict between the policy favoring free alienability of land and the policy favoring enforcement of judgments for support.¹⁵⁷ Although some support can be found for the *Uhrich* holding in the law of other states,¹⁵⁸ it should be noted that in most states, though not in Indiana, alimony decrees are enforceable by contempt.¹⁵⁹ In Indiana, we have the anomalous situation of a rule denying contempt enforcement to alimony judgments on the ground that they are "judgment debts,"¹⁶⁰ based on a line of cases reasoning that contempt enforcement was unnecessary because an alimony judgment was "an absolute personal judgment, which is collected by execution as other judgments."¹⁶¹ This rule now exists alongside rules requiring that a second judgment be obtained before an alimony judgment can be enforced by execution and denying that alimony judgments have the same effect as other judgments as far as the general judgment lien statute is concerned. Collectively, these rules present a curious implementation of the legislative policy expressed in the provision of the Dissolution of Marriage Act that the terms of a decree for maintenance, support, and property division "may be enforced by all remedies available for enforcement of a judgment including but not limited to contempt."¹⁶² This provision clearly expresses a legislative judgment that judgments for support of a spouse or children should be more readily enforceable than other money judgments, rather than less.

The limitations now placed on enforcement of support judgments by contempt and by execution serve to underscore the importance of the question expressly reserved in *Uhrich*: whether a lien may be expressly created in a decree under the Dissolution of Marriage Act.¹⁶³ Section 15 of the Act expressly authorizes the trial court to "provide for such security, bond or other guarantee that shall be satisfactory to the court to secure the obligation to make child support payments or to secure the division of property."¹⁶⁴ The language of this provision is certainly broad enough to cover the

¹⁵⁷See H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

¹⁵⁸See cases collected in Annot., 59 A.L.R.2d 656, 678 (1958).

¹⁵⁹H. CLARK, LAW OF DOMESTIC RELATIONS § 14.10 (1968).

¹⁶⁰State *ex rel.* Schutz v. Marion Superior Court, 261 Ind. 535, 538, 307 N.E.2d 53, 55 (1974).

¹⁶¹Musselman v. Musselman, 44 Ind. 106, 122 (1873).

¹⁶²IND. CODE § 31-1-11.5-17(a) (1976) (emphasis added).

¹⁶³362 N.E.2d at 1164 n.2.

¹⁶⁴IND. CODE § 31-1-11.5-15 (1976). Note this section makes no provision for securing maintenance payments.

creation of a lien.¹⁶⁵ It also suggests that in all cases where the collectibility of a financial award is in doubt, the parties should insist that the decree contain adequate security provisions. Since under *Uhrich* no automatic lien results from a money judgment in a dissolution action, the parties must attempt to protect themselves through the fullest possible use of the courts' power to provide security under section 15.

D. Paternity

In *J.E.G. v. C.J.E.*,¹⁶⁶ the natural mother filed a verified petition alleging that J.E.G. was her eight-month-old child's father. At the request of the mother's attorney, the court issued a warrant for J.E.G.'s arrest. Two months later, J.E.G. was arrested and detained for eight days before being brought before the court. Although he conferred with an attorney, none entered an appearance to represent him in the paternity proceeding. At the hearing, J.E.G. stated under oath that he was "pretty sure that it [the child] is mine," and later, when asked if he acknowledged the child to be his, he answered, "Yes."¹⁶⁷ Judgment of paternity was entered based solely on this admission.¹⁶⁸ On appeal, the Second District Court of Appeals reversed the judgment, holding that both the arrest and the detention were unreasonable, that the admission of paternity was tainted by the illegal arrest and detention, and therefore the admission could not properly constitute the sole basis for the judgment. Judge Buchanan dissented on the ground that the exclusionary rule should apply only to criminal proceedings.¹⁶⁹

Since the mother did not participate in the appeal, Judge Sullivan's majority opinion proceeded on the premise that J.E.G. needed only to make out a *prima facie* case of reversible error in order to be entitled to reversal. On this basis, the court noted that there was nothing in the record to show that the trial court had probable cause to believe that J.E.G. was the putative father and that he would not respond to a summons. Even though the paternity statutes specifically authorize issuance of an arrest warrant in lieu of a summons,¹⁷⁰ the constitutional prohibitions against unreasonable searches and seizures¹⁷¹ require probable cause in civil as well as

¹⁶⁵In other jurisdictions, courts have generally upheld the power of courts to create liens under similar statutes. See cases collected in Annot., 59 A.L.R.2d 656, 680-81 (1958).

¹⁶⁶360 N.E.2d 1030 (Ind. Ct. App. 1977).

¹⁶⁷*Id.* at 1033.

¹⁶⁸*Id.* at 1032.

¹⁶⁹*Id.* at 1037-38.

¹⁷⁰IND. CODE § 31-4-1-13 (1976).

¹⁷¹U.S. CONST. amends. IV, XIV; IND. CONST. art. 1, § 11.

criminal cases. Without a showing that the more drastic arrest warrant was necessary in order to effect the public interest in assuring support of illegitimate children, the arrest was unreasonable. The detention was also unreasonable, since it was not necessary to the acquisition or retention of jurisdiction over the defendant or to assure satisfaction of any judgment that might be obtained.¹⁷²

Relying on United States Supreme Court cases decided in the context of criminal proceedings,¹⁷³ the majority held that the illegal arrest and detention required suppression of the defendant's admission, leaving no evidence to support the trial court's judgment of paternity. It was on this point that Judge Buchanan dissented; the exclusionary rule should be confined to criminal proceedings and should not be extended to proceedings essentially civil in nature. He pointed out that the purpose of a paternity proceeding is not "to impose a fine, a forfeiture or imprisonment," but to assure that the child involved is supported from the time of its birth.¹⁷⁴ Conceding that J.E.G.'s arrest *may* have been illegal, Judge Buchanan would hold society's interest in the child sufficient to require admission into evidence of J.E.G.'s acknowledgement of paternity.

The exclusionary rule applied to this case was not the more familiar *Miranda* rule, which is based on the fifth amendment provision that no person "be compelled in any *criminal case* to be a witness against himself."¹⁷⁵ That rule clearly would have no application in a civil proceeding. The exclusionary rule applied in *J.E.G.*, however, is based upon the defendant's fourth amendment right to be secure against "unreasonable searches and seizures,"¹⁷⁶ and there

¹⁷²The statute authorizes a court to require a putative father to post a pre-trial bond and provides that the bond can be declared forfeited if he fails to appear. The proceeds of the bond may then be "put in suit" by the person in whose favor a judgment for money is rendered. IND. CODE § 31-4-1-14 (1976). Statutes also authorize enforcement of a judgment by contempt or by requiring a post-judgment bond. *Id.* §§ 31-4-1-20, -22. In light of these provisions, and in the absence of anything in the record indicating any necessity for detention, the majority held the detention to be unreasonable.

¹⁷³Brown v. Illinois, 422 U.S. 590 (1975) (murder); Wong Sun v. United States, 371 U.S. 471 (1963) (sale of narcotics).

¹⁷⁴State *ex rel.* Beaven v. Marion Juvenile Court, 243 Ind. 209, 184 N.E.2d 20 (1962), cited in *J.E.G. v. C.J.E.*, 360 N.E.2d 1030, 1038 (Ind. Ct. App. 1977) (Buchanan, J., dissenting).

¹⁷⁵U.S. CONST. amend. V (emphasis added). This provision, as well as the right to counsel, *id.* amend. VI, was the basis for the exclusionary rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966). The Indiana paternity statutes contain an analogous provision that the putative father "shall not be compelled to give evidence." IND. CODE § 13-4-1-16 (1976).

¹⁷⁶U.S. CONST. amend. IV, provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and

is nothing in the nature of the right or the language of the fourth amendment which would foreclose its application to non-criminal proceedings.¹⁷⁷ It is therefore a question of policy whether abuse of the statutory authorization for issuing arrest warrants in paternity cases is sufficiently serious to justify excluding admissions resulting from illegal arrest and detention. Although no criminal penalties follow from a determination of paternity, it does impose a substantial and continuing obligation of support, enforceable by imprisonment for contempt. Where an admission of paternity is given, as in this case, under circumstances which at least cast doubt upon its voluntariness,¹⁷⁸ it does seem a slender thread upon which to hang so heavy a liability. Excluding such an admission serves to discourage the careless or unnecessary use of arrest and detention in paternity cases.

IX. Evidence

*William Marple**

A. Opinions

In *Williams v. State*,¹ the Indiana Supreme Court held that "[a]n opinion by an expert witness upon an ultimate fact in issue is not excludable for that reason."² The court also held that lay witness opinion testimony concerning an ultimate fact issue is also permissible within the discretion of the trial court.³ The *Williams* holding appears to conflict with *Strickland v. State*,⁴ a later decision by the

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹⁷⁷The Supreme Court has held that the fourth amendment right (though not the exclusionary rule) is applicable to administrative searches not related to criminal prosecution. *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967) (refusal of entry to city housing inspectors checking for violation of building occupancy permit).

¹⁷⁸The involuntary nature of the confession resulting from illegal arrest is, at least in part, the basis for its exclusion. *See Brown v. Illinois*, 422 U.S. 590, 599 (1975).

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¹352 N.E.2d 733 (Ind. 1976).

²*Id.* at 714.

³*Id.* at 742 (citing *Rieth-Riley Constr. Co. v. McCarrell*, 325 N.E.2d 844 (Ind. Ct. App. 1975), noted in Marple, *Evidence, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 239, 245 (1975)).

⁴359 N.E.2d 244 (Ind. 1977).

supreme court. In *Strickland*, the court held that it was proper for the trial court to sustain an objection to a question asked of a lay witness that inquired if the witness knew whether the defendant had "any malice" toward the decedent. The supreme court stated that the "opinion rule excludes an eyewitness' conclusion as to the state of mind of another person."⁶ The court noted that this is the province of the jury, which is equally able to infer a person's state of mind from the factual testimony observed and related by the witness.⁷

Strickland is limited to opinions as to the state of mind of another person, but that seems hardly a worthy distinction for resurrecting a *per se* opinion rule to exclude all opinion testimony on ultimate facts. The seminal case of *Rieth-Riley Construction Co. v. McCarrell*⁸ followed rule 704 of the Federal Rules of Evidence, which provides that opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. The court of appeals in *Rieth-Riley*, while abolishing the *per se* exclusionary rule, left the decision as to admissibility to the discretion of the trial judge. The focus of the trial judge should be to decide whether or not the opinion, by a lay person or an expert, is helpful to the trier of fact.

The testimony objected to in *Williams* was that of the police officer who investigated the scene of an armed robbery and examined a shooting victim. In attempting to administer first aid, he concluded from the blood in the victim's mouth and nose that the victim was suffering from internal hemorrhaging. Specifically, the officer testified: "I would say he was in critical condition."⁹ The court noted that the officer had had previous experience on accident scenes and in administering first-aid; the court did not suggest that this experience elevated the stature of the officer's testimony from that of an ordinary lay witness, but rather that it served as a proper factual basis for the opinion.

In *Rieth-Riley*, the foreman of defendant's road construction crew made an out of court statement that he subsequently affirmed in court to the effect that if he had been driving the car in plaintiff's position, he would not have been able to avoid the accident. The factual basis for this opinion was both his personal knowledge of what the construction crew was doing immediately prior to the accident, due to his background in the construction industry, and his own driving experience. The court noted that the foreman was the only

⁶*Id.* at 248.

⁷*Id.*

⁸325 N.E.2d 844 (Ind. Ct. App. 1975).

⁹352 N.E.2d at 739.

eyewitness to the accident. The factors that the court considered on the admissibility of the opinion upon an ultimate issue were: first, the personal knowledge of the witness of the attendant circumstances, and second, the experience of the witness, which in light of the attendant circumstances tends to make the opinion useful to the jury.⁹ In *Williams*, the officer had previous experience in first-aid and dealing with accident victims and first-hand knowledge of the blood in the victim's mouth and nose; in *Rieth-Riley*, the foreman was the only witness with first-hand knowledge of the attendant circumstances and experience as an operator of motor vehicles. Thus, while the weight accorded to experience and personal knowledge serving as the factual basis may vary with the case, the rule that such opinion testimony is not objectionable per se, so long as it appears that it will be useful to the jury, is consistent.

The *Strickland* opinion may not be as inconsistent as it first appears, and not simply for the superficial reason that the admissibility of an opinion on an ultimate issue is within the discretion of the trial court. While a witness may have personal knowledge of facts that tend to show the state of mind of another, it does not follow that the witness can have personal knowledge of the state of mind itself. Nor would personal experience be accorded more weight, as once the witness had attested to the facts that tend to show state of mind, the jury should be able to draw an inference as well as the witness as to that state of mind. Hence, the opinion is not helpful to the jury.

The only way to harmonize the *Strickland* decision with *Rieth-Riley* and *Williams* is to consider the particular context in which the opinion was offered. In both *Williams* and *Strickland*, the Indiana Supreme Court upheld the decision of the trial judge on the admissibility of the opinion. Thus, implicitly at least, the court applied the rule as stated in *Rieth-Riley*: The trial judge should consider the nature of the issue and the offered opinion in light of all attendant circumstances of the particular case. The discretion of the trial judge will only be reviewed for an abuse thereof.¹⁰

B. Privilege

An irony in Indiana criminal law is illustrated by a comparison of two cases concerning statements made by juveniles. In *Garrett v.*

⁹325 N.E.2d at 853.

¹⁰*Williams* was cited with approval for the proposition that "[t]he admission of opinion testimony on an ultimate fact issue is within the discretion of the trial court," in *Bobbitt v. State*, 361 N.E.2d 1193, 1197 (Ind. 1977); *accord*, *Palmer v. State*, 363 N.E.2d 1245, 1248 (Ind. Ct. App. 1977); *contra*, *Hunter v. State*, 360 N.E.2d 588, 600 (Ind. Ct. App. 1977).

State,¹¹ the supreme court extended the holding of *Lewis v. State*¹² to require that a juvenile also be given the right to consult a parent or guardian before his confession can be deemed voluntary; furthermore, the consultation must be *meaningful*. In *Garrett*, the juvenile was interrogated prior to the arrival of his mother at the police station. During her initial visit, the interrogation continued. The supreme court, without any apparent showing of such fact in the record, held that the consultation between the juvenile and his mother was not meaningful because it was "too short and perfunctory and too closely supervised to be deemed adequate."¹³ It is clear from *Garrett* that the state has the burden of showing every element of voluntariness in introducing a juvenile confession. It also indicates that the supreme court views any juvenile confession with disfavor, and that the state will have a heavy burden to bear if it seeks to use a juvenile's confession.¹⁴

This holding becomes particularly ironic when it is read in light of *Cissna v. State*,¹⁵ wherein the First District Court of Appeals held that there is no parent-child privilege that would prevent a parent from testifying against a child. The court examined the known privileges in Indiana, all of which exist by virtue of state statutes, and did not find a parent-child privilege. *Garrett* held that a juvenile may not lawfully confess absent a consultation with his parent.¹⁶ *Cissna* held that if the child makes incriminating statements, the parent can be compelled to testify about the statements.¹⁷ Thus, the parent who wants to prevent the child from making incriminating statements that can be used in court would be wise not to talk to the child at all. The juvenile's attorney could conduct the consultation with the attendant attorney-client privilege protecting against the disclosure of any incriminating statements. The attorney could also, of course, advise the juvenile not to waive the right against self-incrimination.

C. Expert Testimony

*Walters v. Kellam & Foley*¹⁸ is an instructive case on the use of hypothetical questions. The trial court sustained an objection to a lengthy hypothetical question by the plaintiff in a tort case on the

¹¹351 N.E.2d 30 (Ind. 1976).

¹²259 Ind. 431, 288 N.E.2d 138 (1972), *noted in* 6 IND. L. REV. 577 (1973).

¹³351 N.E.2d at 34.

¹⁴See *Hall v. State*, 346 N.E.2d 584 (Ind. 1976).

¹⁵352 N.E.2d 793 (Ind. Ct. App. 1976).

¹⁶351 N.E.2d at 32.

¹⁷352 N.E.2d at 795.

¹⁸360 N.E.2d 199 (Ind. Ct. App. 1977).

grounds that the proper foundation for showing the qualifications of the expert had not been shown, and because certain facts had been omitted from the question. The court indicated that the defendants claimed this expert lacked specific qualifications with regard to the particular area of expertise that his education and experience represented.¹⁹ However, the court held that such an objection goes to the weight of the witness' testimony and may be adequately challenged on cross-examination.

The court also held that the expert should have been allowed to state his opinion about how a different design would have prevented plaintiff's injury. "A hypothetical question need not contain all the facts in evidence. It must, however, contain sufficient facts and inferences to present a true and fair relationship to the whole evidence in the case."²⁰ Thus, the court adopted the more expedient and widely prevailing view that all material facts need not be included in the facts of the question. "The safeguards are that the adversary may on cross-examination supply omitted facts and ask the expert if his opinion would be modified by them"²¹

Furthermore, the court reminded the bar that "the complications which spurred this appeal are precisely those which give impetus to the pre-trial procedures provided in Indiana Rules of Procedure, Trial Rule 16."²² A proponent of a hypothetical question should always have the question prepared in writing before trial. The expert can be shown the question and be given time to properly prepare his answer. If the question is properly drafted, the proponent should also provide copies of the question to the trial judge and opposing counsel. This procedure insures that the proper facts are in the record and are presented to the expert. It is also more difficult for opposing counsel to confuse the witness, the proponent, the judge, or the jury because the trial court should require the objecting counsel to state specifically what is omitted or what is included that is omitted. The corrections or deletions can then be written into everyone's copy. The result is that there is much less confusion and rereading and rephrasing of the question. Additionally, the proponent of the question is wise to use a pre-trial conference as suggested by the court of appeals to clarify any objections to the question.

¹⁹*Id.* at 219.

²⁰*Id.*

²¹*Id.* at 220 (citing MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 14, at 33 (2d ed. 1972)).

²²360 N.E.2d at 220.

D. *Impeachment*

An unresolved area of evidence is the foundation required of an attorney who seeks to cross-examine a witness concerning matters not in evidence. In *United States v. Harris*,²³ decided by the Seventh Circuit Court of Appeals, the attorneys for two of the criminal defendants in a conspiracy case argued that the United States Attorney had not supplied a factual predicate for questions he asked of the defendants on cross-examination. At trial, the two defendants were asked whether they had received money from various persons. Both defendants denied they had received any payments. The defense attorneys objected that the questions regarding payments were prejudicial because the persons who impliedly made the payments were not available to testify and substantiate the implications.

The court of appeals stated the often repeated rule that it is improper for the prosecution to ask a question that implies a factual predicate that the examiner knows he cannot support by evidence or for which he has no reason to believe there is a foundation of truth.²⁴ The court cited several cases in which it has been held that it is reversible error if the factual predicate is not proven at trial. Specifically, when an attorney lays a foundation by asking a witness about prior inconsistent statements, it is reversible error to fail to produce the person to whom the statement was made if the witness denies making the statement.²⁵ It has also been held that counsel may not ask questions implying a valid conviction when he does not have a certified record of a conviction available to rebut a denial.²⁶ Finally, it is improper to ask inflammatory questions when it is agreed by the government that the matters implied by the questions could not be introduced into evidence.²⁷ The Seventh Circuit recognized valid instances of questioning without a factual predicate: If counsel has a "reasonable suspicion" that circumstances might be true, he may be allowed to probe an area on cross-examination. The examiner, however, will be bound by the witness' answer.

A safeguard that should be required in such cases is that upon requests of opposing counsel the examiner should be required to

²³542 F.2d 1283 (7th Cir. 1976).

²⁴*Id.* at 1307 (citing ABA STANDARDS, THE ADMINISTRATION OF CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 5.7(d) (1974)); 6 J. WIGMORE, EVIDENCE § 1808, at 369 (Chadbourn rev. 1976).

²⁵United States v. Bohle, 445 F.2d 54 (1st Cir. 1967).

²⁶State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973). See also *Ciravolo v. United States*, 384 F.2d 54 (1st Cir. 1967).

²⁷Richardson v. United States, 150 F.2d 58, 64 (6th Cir. 1945).

demonstrate to the trial court the actual existence of the specific acts of misconduct in question, and their relevancy, out of the hearing of the jury.²⁸ This procedure would insulate the jury from unsupported innuendo as a result of questions by the examiner that were asked without basis and in bad faith, yet without creating hardship for the examiner. If the specific act occurred, the foundation could easily be introduced into evidence. On the other hand, if the act did not occur, it would be grossly unfair to allow questions based on nonexistent conduct.

In *Harris*, the Seventh Circuit approved the above safeguard procedures but did not require them. Thus, in the federal courts, the matter rests within the discretion of the trial judge. The court also held that the questions asked in *Harris* did not imply the type of conduct that the courts have held is so prejudicial that the prosecutor must not only have evidence available before asking it but also actually introduce it if the witness denies the conduct. The approach taken by the *Harris* court is that the foundation of the factual basis required for a question is directly suspect due to the inflammatory influence which flows from the question.

In summary, nothing prohibits an attorney from "going fishing" on cross-examination concerning statements, acts, or conduct that he reasonably believes may have occurred but is without evidence to support. The examiner will be bound by the answer of the witness, of course, which leaves only an unsupported inference in the jury's mind and nothing to argue in closing argument. Without any evidence in the record, the proponent of the question may also subject himself to the charge in closing argument that he is trying his case by innuendo. Thus, the ultimate benefit of this type of questioning is not as great as it might appear at first glance.

²⁸The suggested procedure was approved in *Michelson v. United States*, 335 U.S. 469, 481n.18 (1948), "as calculated in practice to hold the inquiry within decent bounds." *Accord*, *United States v. Phillips*, 217 F.2d 435, 443-44 (7th Cir. 1954); *People v. Dorrikas*, 354 Mich. 303, 92 N.W.2d 305 (1958). See *MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE* § 192, at 458 (2d ed. 1972), wherein the author would require a "professional statement" from the prosecutor that he has reason to believe and does believe that the acts in question have occurred.

X. Insurance

*Arvid L. Mortensen**

Four cases were decided during the survey period that are of particular interest to attorneys practicing insurance law. Of greatest significance is a decision in which a carrier, although not a party to an uninsured motorist suit, was bound by the judgment on an action brought by its insured. Secondly, the Indiana Court of Appeals added an additional dimension to the definition of who is an "insured" under uninsured motorist coverage. Thirdly, a federal court determined that punitive damages attributed to a corporation could be shifted to its insurer. Finally, policy provisions for group accidental death coverage were strictly construed in favor of the insurer.

A. Uninsured Motorist Coverage

1. Right to Intervene.—In *Vernon Fire & Casualty Insurance Co. v. Matney*,¹ the First District Court of Appeals, in affirming the summary judgment of a trial court against the insurance company, determined that (1) the insurance company did have a right and duty to intervene in an action between an insured and an uninsured motorist, (2) the insurance company was a proper party to a suit against an uninsured motorist, and (3) a judgment against an uninsured motorist was binding against the insurance company.

Jimmie D. Matney, an insured individual under the Family Protection Coverage in a policy issued by Vernon Fire & Casualty Company (Vernon), was a passenger on a motorcycle. Matney received serious injuries from a collision of the motorcycle and an automobile driven by an uninsured motorist, Ethel Thoms. Matney brought action against Thoms and gave notice to Vernon of the significant litigatory steps in the action against Thoms. Prior to the proceedings against Thoms, Matney also served notice upon Vernon of his intention to assert a first-party claim under his uninsured motorist coverage (UMC). A summary judgment against Thoms and an award of \$25,000 were granted. Matney then demanded payment from Vernon under the UMC provision of his policy and was refused. Matney sued Vernon for the policy limit and received summary

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¹351 N.E.2d 60 (Ind. Ct. App. 1976).

judgment for the \$10,000 policy limit. Vernon appealed, raising the issues of (1) the right or duty of Vernon to intervene in the action between Matney and Thoms, (2) the position of Vernon in the proceedings, and (3) the effect of the judgment against Thoms on Vernon.

Following the reasoning of *Indiana Insurance Co. v. Noble*,² the court held that the insurance company has the right to have all issues adjudicated at a single trial.³ In *Noble*, the court determined that an insurer could intervene in an action by its insured against an uninsured motorist because multiple litigation should be discouraged where possible. Although a later case, *Smith v. Midwest Mutual Insurance Co.*,⁴ indicated that an insurer could not be allowed to take part in a suit between the insured and an uninsured motorist, the court overruled the *Smith* approach and chose instead to follow the reasoning expressed in *Noble*.⁵ The court cited *Noble* for the four options available to an insured who seeks to recover for injuries resulting from a collision with an uninsured motorist.⁶ Focusing on the third alternative, which allows the insured party to judicially resolve the issues of damages and liability against the uninsured motorist without joining the insurer *when notice is given the insurer*, the court reasoned that the insurance company did have a

²148 Ind. App. 297, 265 N.E.2d 419 (1970), *transfer denied*, No. 569A84 (Ind. June 8, 1971).

³351 N.E.2d at 64.

⁴154 Ind. App. 259, 289 N.E.2d 788 (1972).

⁵351 N.E.2d at 65. The court expressed concern about the potential conflict of interest between the insurance carrier and its insured when the insurer intervenes. Noting that if intervention was prohibited two separate trials with two different verdicts based on the same factual situation would be possible, the court determined that "the cumulative effect of the spirit of the Indiana Trial Rules, the interests of justice, the avoidance of multiple litigation and the conservation of judicial time" called for insurer intervention.

⁶*Noble* outlined the insured's options for recovery as follows:

1. He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.
2. He may file an action joining both the uninsured motorist and the insurance company as party defendants and litigate all of the issues of liability and damages in that action.
3. He may file an action against the uninsured motorist alone without joining the insurance company as a party defendant and litigate the issues of liability and damages. In such case he gives preliminary and adequate notice of the filing and pendency of such action to the insurance company so that they make [sic] take appropriate action including intervention.
4. He may file an action against the uninsured motorist and give no notice to the insurance company.

Id. at 63 (citing *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970) (citations omitted)).

right and a duty to decide whether or not to become a party in the suit.⁷

Answering the second issue, the court determined that Vernon was a proper party to the action of Matney against Thoms.⁸ Matney, Thoms, and Vernon were all concerned with the same issues of fact. If Vernon had elected to defend its interests, Matney would have been spared the difficulty of an initial action against Thoms and a subsequent action against Vernon. Noting that the conflict of interest between the insurer and the insured would always be present, the court held that such a conflict was not sufficient to prevent Vernon from defending its interest in the first trial, had the insurer chosen to do so.⁹

Finally, the First District Court of Appeals held that the judgment against Thoms was binding on Vernon for the liability and damages issues because Vernon repeatedly denied coverage or liability to Matney after being notified of every significant act taken against Thoms.¹⁰ Furthermore, the uninsured motorist statutory language in conjunction with the policy provisions justified such a result.¹¹

⁷*Id.* at 64. The court noted that Indiana Trial Rule 24(A) controlled the insurer's intervention.

⁸*Id.* at 65.

⁹*Id. See Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970). Judge White, dissenting, called attention to the legal and ethical problems which arise when an insurance company participates in the defense of an uninsured motorist. *Id.* at 335-36, 265 N.E.2d at 443.

¹⁰351 N.E.2d at 65. Vernon had received and acknowledged repeated notice of the proceedings of Matney against Thoms. The court indicated that by not intervening in the original action, Vernon had waived any defenses to liability and damages.

¹¹Indiana uninsured motorists coverage is mandated in IND. CODE § 27-7-5-1 (1976): No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

The policy issued by Vernon to Burton Matney, the father of the injured party, provided:

Coverage J—Family Protection (Damages for Bodily Injury): To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determina-

This decision answers a troublesome question that has plagued the Indiana insurance bar. When an insured gives adequate notice to his insurer, a judgment in favor of the insured against an uninsured motorist will apparently be binding on the insurer whether or not the carrier chooses to become a party to the original action by intervening.

2. *Definition of Insured.*—*Vernon Fire & Casualty Insurance Co. v. American Underwriters, Inc.*¹² presents the question of whether a carrier may restrict its UMC to exclude occupants of the insured vehicle. This issue had not previously come before the Indiana courts because it has been generally assumed that "coverage for persons who are occupying an insured vehicle when they are injured by an uninsured motorist operating another vehicle is unquestioned."¹³

Joe Lancaster was injured while riding as a passenger on a motorcycle operated and owned by Jack A. Davidson when the motorcycle collided with an automobile operated by Pete A. Hall, an uninsured motorist. American Underwriters, Inc. (AUI) had insured Davidson's motorcycle for liability and UMC. Joe Lancaster and his father, who had paid Joe's medical expenses, carried UMC with Vernon. Although Vernon was willing to pay its share of Lancaster's medical expenses, AUI denied any coverage to Lancaster. AUI claimed its policy did not provide uninsured motorist coverage to passengers of vehicles owned by its insureds.¹⁴

The trial court ruled that neither Joe Lancaster nor his father were entitled to recover from AUI, but the First District Court of Appeals reversed the trial court's decision and required AUI to contribute a pro rata share of Joe Lancaster's stipulated damages.¹⁵

Analyzing the language of the Indiana Uninsured Motorists

tion as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

351 N.E.2d at 66.

¹²356 N.E.2d 693 (Ind. Ct. App. 1976).

¹³A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.10 (Supp. 1974).

¹⁴356 N.E.2d at 694. The parties stipulated that Hall was negligent and was the proximate cause of the accident.

¹⁵*Id.* at 696. Damages were \$23,998.43 in medical expenses.

Act,¹⁶ the "Persons Insured" clause of AUI's policy,¹⁷ the definition of an insured for liability purposes in the same policy,¹⁸ and the uninsured motorist provision of the AUI coverage,¹⁹ the court found that some internal conflict existed within the policy, which in turn conflicted with the language of the Indiana Uninsured Motorists Act. The uninsured motorist statute was held to provide the minimum

¹⁶IND. CODE § 27-7-5-1 (1976) provides:

No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Acts 1947, chapter 159, sec. 14, as amended heretofore and hereafter, under policy provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Provided, That the named insured shall have the right to reject such coverage (in writing) and Provided further, That unless the named insured thereafter requests such coverage, in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage, in connection with a policy previously issued to him by the same insurer.

¹⁷The following clause was in the AUI policy:

Persons Insured: The following only are insured under the Uninsured Motorists Coverage: The named insured and the lawful spouse of such named insured if, and only if, such spouse is living with the named insured at the time of the accident.

356 N.E.2d at 695.

¹⁸An insured was defined in the liability section of the AUI policy as follows:
(3) Definition of Insured (Coverages A and B): With respect to the insurance provided by this contract, the unqualified word "insured" means only the insured specified as the named insured on the application page of this policy and any other person using the insured motorcycle described in this policy to whom the named insured has given permission, provided the use is within the scope of such permission and provided such person is a licensed driver over 16 years of age.

Id.

¹⁹The uninsured motorist coverage of the AUI policy stated:

Coverage C—Protection Against Uninsured Motorists: To pay all sums which the insured or his legal representative shall be legally entitled to receive as damages from the owner or operator of an uninsured automobile because of bodily injury, including death resulting therefrom sustained by the insured, caused by accident and arising out of the use of such uninsured automobile provided for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the Underwriters, or if they fail to agree, by arbitration.

Id.

standard of protection to a passenger, regardless of the policy's language.²⁰

It was determined that AUI had attempted to define its uninsured motorist coverage more narrowly than that allowed by Indiana statute. Such a limiting could not be approved by the appellate court.²¹ Insurers, then, must be at least as liberal in the drafting of their uninsured motorist clauses as the statutory minimum.²² In light of this holding, it would follow that the term "insured" must include the vehicle owner and all others who legally use or operate the insured vehicle.

B. Punitive Damages

Indiana courts have previously held that punitive damages are recoverable when there is a statutory tort.²³ In *Norfolk & Western Railway v. Hartford Accident & Indemnity Co.*,²⁴ the United States District Court for the Northern District of Indiana considered a question of first impression as to whether an insured may shift the burden of a punitive damage award to its insurer. The court held

²⁰*Id.* at 696. The court cited *Taylor v. American Underwriters, Inc.*, 352 N.E.2d 86 (Ind. Ct. App. 1976), for the rule that a conflict within a policy does not require a holding of ambiguity. Indicating that the policy terms were clear and unambiguous in their meaning, it was determined that the provisions would not be construed against the insurer. *See generally* *United Farm Bureau Mut. Ins. Co. v. Pierce*, 152 Ind. App. 387, 283 N.E.2d 788 (1972).

The court followed the reasoning of *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971), as to the ineffectiveness of policy clauses which are narrower than the statutory standard. 356 N.E.2d at 696. In *Cannon*, the court stated:

[T]he legislative intent in requiring certain insurance policies to provide protection for policyholders injured by operators of "uninsured motor vehicles" should be liberally construed to the end that persons injured by uninsured motorists be protected to the limits of such policies to the same extent that they would have been protected if the tort-feasors had carried insurance.

150 Ind. App. at 28, 275 N.E.2d at 571 (quoting *Bowsher v. State Farm Fire & Cas. Co.*, 244 Or. 549, 419 P.2d 606 (1966)).

²¹356 N.E.2d at 696 (citing *Ely v. State Farm Ins. Co.*, 148 Ind. App. 586, 268 N.E.2d 316 (1971)). *See also* *Taylor v. American Underwriters, Inc.*, 352 N.E.2d 86 (Ind. Ct. App. 1976); *Patton v. Safeco Ins. Co. of America*, 148 Ind. App. 548, 267 N.E.2d 859 (1971); *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971).

See Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 307, 265 N.E.2d 419, 426 (1970), *transfer denied*, No. 569A84 (Ind. June 8, 1971), for cases which indicate that uninsured motorist legislation should be liberally construed.

²²356 N.E.2d at 696.

²³*See Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976), *discussed in Frandsen, Insurance, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 243, 243 (1976); *Jeffersonville R.R. Co. v. Rogers*, 38 Ind. 116 (1871); *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

²⁴420 F. Supp. 92 (N.D. Ind. 1976).

that "it would not be inconsistent with public policy to allow the corporation to shift to an insurer the punitive damage award when that award is placed upon the corporation solely as a matter of vicarious liability."²⁵

The court distinguished between liability for punitive damages that is imposed directly and liability for punitive damages that is imposed through respondeat superior.²⁶ Generally, where punitive damages are awarded as a deterrent or punishment for the insured's behavior, the award may not be shifted to the insurer.²⁷ However, where the corporation as employer is held liable for a punitive damage award where an employee acts within the scope of his employment, an exception to this rule is created.²⁸ When met, this exception allows the corporation to hold the insurer liable for the punitive damage award, provided the policy provisions do not exclude such coverage.²⁹

In *Norfolk & Western Railway*, Hartford Accident and Indemnity provided an insurance policy to Norfolk.³⁰ A truck owned by Norfolk and driven by an employee was involved in an automobile accident with another vehicle. The jury awarded the injured party \$67,000 in compensatory damages and \$200,000 in punitive damages. Hartford paid the compensatory damage amount. Hartford and Norfolk negotiated the punitive damages down to \$187,500 and divided the burden of payment equally between them, subject to judicial determination of rights to coverage. Norfolk then sued Hartford to

²⁵Id. at 97.

²⁶Id. at 96. Direct liability for punitive damages is imposed when the corporation has acted in a malicious or oppressive manner. See *Jeffersonville R.R. Co. v. Rogers*, 38 Ind. 116, 126 (1871). Vicarious liability through respondeat superior is created when the corporation, without a wrong of its own, is held responsible for the tortious act of its agent.

²⁷"To the extent, then, that the law imposes punitive damages upon an insured in order to shape or deter the insured's conduct, the insured may not avoid the penalty by means of insurance." 420 F. Supp. at 95.

²⁸See *Morford v. Woodworth*, 7 Ind. 83 (1855); *Taber v. Hutson*, 5 Ind. 322 (1854).

²⁹420 F. Supp. at 95.

³⁰The insurance policy issued by Hartford to Norfolk included "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use . . . of any automobile." 420 F. Supp. at 93.

Employees of Norfolk were included as insureds under the contract, and damages were defined as "damages for death and for care and for loss of services resulting from bodily injury and damages for loss of use of property resulting from property damage." *Id.*

Thus, the policy provisions were quite liberal in coverage of the insured. The court noted that the insurance contract covered punitive damages because Hartford could have chosen to specifically exclude such damages in its broad definition of coverage.

recover the \$93,750 it paid; Hartford counterclaimed for its \$93,750 payment. Applying Indiana law,³¹ Judge Eschbach determined that the insured was only vicariously liable; and, thus, it was not contrary to public policy for Norfolk to receive full payment of the punitive damage award from Hartford.³²

Although the particular policy issued by Hartford was of a standard form used throughout the country,³³ it appears that an insurer can take steps to protect itself from punitive damage awards based on vicarious liability by expressly excluding exemplary or punitive damages in the policy. Given the competitive nature of the property and casualty lines, profitability problems, and the relatively low premium per vehicle when a group policy is used, changes in coverage clauses are likely to occur.

C. Accidental Death

In *Equitable Life Assurance Society v. Crowe*,³⁴ a group accidental death policy was literally interpreted, resulting in a judgment in favor of the insurer. Barbara Phillips was employed by General Tire and Rubber Company and was covered under the employees' group accidental death policy issued by Equitable. Phillips was laid off her job on February 15, 1974, and was accidentally killed on February 27, 1974. Mildred Crowe, as Phillips' beneficiary, won summary judgment from the trial court for the insurance proceeds of \$9,500.³⁵ The First District Court of Appeals reversed the lower court decision after finding that although the premium for Phillips' coverage had been paid in February, the policy provisions requiring both notice of termination of employment and payment of premium had not been met.³⁶

³¹*Id.* at 97.

³²*Id.* at 98.

³³*Id.* at 94. The court indicated that the identical policy was issued throughout the country and was litigated in *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972).

³⁴354 N.E.2d 772 (Ind. Ct. App. 1976).

³⁵*Id.* at 775.

³⁶The insurance policy issued by Equitable to General Tire provided the following: [I]nsurance hereunder of any employee shall cease automatically upon the occurrence of any of the following events: . . . the termination of his employment in the classes of employees insured hereunder. Cessation of active work by an employee shall be deemed to constitute the termination of his employment except that under the circumstances stated below the Employer may, for the purposes of the insurance hereunder, by filing written notice with the Society and continuing the payment of premiums for the insurance hereunder, regard employees as still in the employment of the Employer for the respective periods stated:

....

Noting the clear and unambiguous language of the policy, Judge Lowdermilk stated: "We cannot treat any part of a contract as surplusage if it can be given a meaning reasonably consistent with other parts of the contract."³⁷ Since Phillips came under the lay-off provision of the insurance contract and had not worked for several days before her death, the court determined that she was not insured because the notice provision of the insurance contract had not been met.³⁸

This case indicates the reluctance of the Indiana courts to substitute any terms of coverage in a contract issued by an insurer and accepted by an insured. When termination is defined as including lay-offs unless certain conditions are met, partial satisfaction of the required provisions will not extend coverage, even though premiums are paid.³⁹

(b) *where the employee is given leave of absence or temporarily laid off:* for the full period of such leave of absence or lay-off, but not exceeding a maximum period of ninety days. After such ninety day period the employee may continue his insurance hereunder by payment of the premium for such insurance.

At the expiration of the respective periods above mentioned, unless the employee shall then return or shall have theretofore returned to active work, his insurance hereunder shall terminate automatically.

Id. at 774-75 (emphasis by the court). The present policy specifically provided that lay-off coverage to an employee was available only upon the performance of two conditions by General Tire: (1) the continued payment of premiums to Equitable and (2) notification to Equitable that the coverage of the terminated employee should be continued.

³⁷*Id.* at 778 (citing *Oard v. Rechter*, 322 N.E.2d 392 (Ind. Ct. App. 1975)).

³⁸Crowe argued that the February 1974 report from General Tire to Equitable listed Phillips as an employee and should have therefore served as adequate written notice to the insurer that Phillips' coverage should continue through February. The court noted that the report covered January events only and could not notify Equitable of the February lay-off. Furthermore, the contract had a specific notice requirement in the employer's report provision which stated the following:

Failure on the part of the Employer to record the insurance of any employee who has qualified for coverage hereunder, or failure on the part of the Employer to include such insurance in the reports furnished to the Society, shall not deprive the employee of his insurance; *nor shall* failure to record the termination of insurance of any employee, or *failure to include such termination in the reports furnished to the Society, be construed as involving or permitting the continuation of his insurance beyond the date of termination as determined by the provisions of this policy.*

354 N.E.2d at 779 (emphasis by the court).

³⁹*Id.* Some may feel that the court's decision is regrettable because the employee may not have known of the notice requirement, and therefore the result would be inconsistent with the employee's reasonable expectations. Assuming that the employee was not aware of the policy's notice provision, an action in negligence may have been available against the employer.

XI. Labor Law

*Gregory J. Utken**

The Indiana state courts handed down a paucity of decisions during the survey period in the area of employer-employee relations.

A. Employment Discrimination

In *Indiana Civil Rights Commission v. Meridian Hills Country Club, Inc.*,¹ a charge of employment discrimination was filed against the defendant with the Indiana Civil Rights Commission. Defendant filed a motion to dismiss with the Commission on the ground that it was a not-for-profit corporation organized as an exclusive social club and, as a result, was not an "employer" under the Indiana Civil Rights Act.² The Commission overruled the motion and set the charge for a public hearing. The defendant then sought and received a permanent injunction from the Marion Circuit Court, prohibiting the Commission from proceeding further.

On appeal, the Commission argued that the trial court had prematurely assumed jurisdiction because the Commission had not entered a final order and therefore had not expressly asserted its jurisdiction, and the defendant had not exhausted its administrative remedies. The court of appeals agreed and reversed with instructions that the permanent injunction be dissolved, observing that had the Commission determined that the defendant was an "employer" and was guilty of discriminatory employment practices after an evidentiary hearing, defendant's proper course of action would have been to pursue judicial review of the Commission's asserted jurisdiction under the Indiana Administrative Adjudication Act.³

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¹357 N.E.2d 5 (Ind. Ct. App. 1976).

²IND. CODE §§ 22-9-1-1 to -13 (1976). The Indiana Civil Rights Act provides in pertinent part:

(h) The term 'employer' means the state, or any political or civil subdivision thereof, and any person employing six (6) or more persons within the state; except that the term 'employer' does not include any not-for-profit corporation or association organized exclusively for fraternal or religious purposes, not any school, educational or charitable religious institution owned or conducted by, or affiliated with, a church or religious institution, nor any exclusively social club, corporation or association that is not organized for profit.

Id. § 22-9-1-3(h).

³*Id.* § 4-22-1-14. See also *Citizens Gas & Coke Util. v. Sloan*, 136 Ind. App. 297, 196 N.E.2d 290 (1964) (administrative agency's jurisdiction may be judicially reviewed following any formal order expressly asserting jurisdiction over the subject matter).

This decision recognized that at the state level the proper place for resolution of an employment discrimination charge is with the Indiana Civil Rights Commission, the state's statutorily created civil rights agency.⁴ Petitioners and respondents alike who fall within the purview of the Act must utilize that procedure, and state courts may not prematurely interfere with the process.

A new item of state legislation is also of interest in employment discrimination law. In federal civil rights actions under 42 U.S.C. §§ 1981, 1983, 1985,⁵ and other related statutes, questions frequently arise as to the applicable statute of limitations, since the federal acts are silent on this issue. Federal courts have attempted to apply the statute of limitations for the state action found to be most analogous to the federal action at bar. This practice has produced a variety of different holdings⁶ as different courts have applied state statutes of limitations governing tort or property actions,⁷ contract actions,⁸ and other types of actions⁹ in deciding civil rights cases.

Although case law has not definitively determined the applicable statute of limitations for employment discrimination cases in Indiana,¹⁰ the Indiana legislature recently resolved the question. In

⁴The stated purpose of the Indiana Civil Rights Act is to prevent discriminatory practices in the state. IND. CODE § 22-9-1-2 (1976). The Civil Rights Commission, which was established to aid in the enforcement and formulation of policies to effectuate the purposes of the Act, is empowered to receive complaints alleging discriminatory practices, to conduct complaint investigations, to hold fact finding hearings, to issue findings of fact following the hearings, and to order the cessation of unlawful discriminatory practices when appropriate. *Id.* § 22-9-1-6.

⁵42 U.S.C. §§ 1981, 1983, 1985 (1970).

⁶See, e.g., *Johnson v. Railway Exp. Agency*, 421 U.S. 454 (1975).

⁷See *Wilson v. Sharon Steel Corp.*, 549 F.2d 276 (3d Cir. 1977) (tortious interference with contract); *Ingram v. Steven Robert Corp.*, 547 F.2d 1260 (5th Cir. 1977) (injury to person or rights); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (injury to person); *Smith v. Olinkraft, Inc.*, 404 F. Supp. 861 (W.D. La. 1975) (wrongful conduct); *Ripp v. Dobbs House, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973) (injury to person or rights); *Utley v. Marks*, 4 Empl. Prac. Dec. 7552 (S.D. Ga. 1971) (injury to property right).

⁸See *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972); *Allen v. Transit Local 788*, 415 F. Supp. 662 (E.D. Mo. 1976); *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D. Pa. 1975); *Lewis v. Bloomsburg Mills, Inc.*, 8 Empl. Prac. Dec. 5325 (D.S.C. 1974); *Broadnax v. Burlington Indus., Inc.*, 7 Empl. Prac. Dec. 7182 (M.D.N.C. 1972).

⁹Several cases have applied a statute of limitations covering liability that arises by statute. See *Drake v. Southwestern Bell Tel. Co.*, 553 F.2d 1185 (8th Cir. 1977); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Minor v. Lakeview Hosp.*, 421 F. Supp. 485 (E.D. Wis. 1976); *White v. Texaco, Inc.*, 6 Empl. Prac. Dec. 6258 (S.D.N.Y. 1973).

¹⁰In *Hill v. Trustees of Indiana Univ.*, 537 F.2d 248 (7th Cir. 1976), Judge Kunzig stated in a concurring opinion that the Indiana statute for character injury, IND. CODE § 34-1-2-2 (1976), applied in a § 1983 action. 537 F.2d at 253-54. This is a two-year statute of limitations.

diana Code section 34-1-2-1.5¹¹ specifically states that all actions relating to the "terms, conditions, and privileges of employment except actions based upon a written contract" must be brought within two years of the occurrence.

B. Strikes and Injunctions

In Indiana, strikes by public employees are illegal.¹² In *Individual Members of the Mishawaka Fire Department v. City of Mishawaka*,¹³ the Third District Court of Appeals had occasion to reaffirm this principle and to determine when a court may properly issue a preliminary injunction against a public employee strike.

The City of Mishawaka had engaged in negotiations with their firefighters over terms and conditions of employment. On August 17, 1974, the firemen went on strike after negotiations collapsed. On August 19, the city commenced suit and obtained a temporary restraining order against the strikers, which was followed by a temporary injunction prohibiting striking and picketing by the firefighters.

On appeal, the firemen argued that the lower court had erred in granting the injunction since at the time of issuance the strike had ended and the firemen were no longer threatening to strike. In upholding the granting of the injunction, the court of appeals noted the illegality of the strike and that while no strike was in progress or threatened at the time the injunction issued, the plaintiffs had already demonstrated the reality of their willingness to strike.¹⁴ Thus, the court ruled that even though no strike was in progress, the prohibitory injunction was properly granted under the trial

¹¹IND. CODE § 34-1-2-1.5 (Supp. 1977).

¹²Anderson Teachers Local 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970). The Indiana statute permitting organization of public employees for collective bargaining purposes, IND. CODE §§ 22-6-4-1 to -13 (1976) (declared unconstitutional 1976), which contained a provision outlawing strikes by public employees, *id.* § 22-6-4-6, was declared unconstitutional and nonseverable by the Indiana Supreme Court shortly after the end of the survey period. Indiana Educ. Employment Relations Bd. v. Benton Community School Corp., 365 N.E.2d 752 (Ind. 1977). See also Archer, *Labor Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 257, 257 (1976); Suntrup, *Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053*, 9 IND. L. REV. 994, 1006 (1976).

¹³355 N.E.2d 447 (Ind. Ct. App. 1976).

¹⁴The firemen entered into a work stoppage twice during the period in question. The first was on August 17 when contract negotiations broke down. On August 19, the mayor told the firefighters that if they returned to work by 7 p.m. they would not be disciplined nor would an injunction be sought. The firefighters returned to work. Subsequently, the parties reached a tentative agreement; however, the city council deadlocked over approval and the firefighters walked off the job again, only to return to work a short time later.

court's broad power to determine temporary relief pending disposition of a dispute on its merits.¹⁶

Plaintiffs also claimed estoppel because the mayor had stated that if they returned to work no injunction would be sought by the city. However, the court quickly disposed of this argument by noting that the purpose of the equitable doctrine of estoppel would be contradicted if the principle could be applied to protect individuals whose only claim of prejudice was interference with the commission of an illegal strike.¹⁷

City of Mishawaka also illustrates the inapplicability of the Indiana Anti-Injunction Statute¹⁸ to public employees and the judiciary's refusal to weigh a public employer's conduct in deciding the equitable issue of injunctive relief.¹⁹

C. Unemployment Compensation

There were two cases of significance decided during the survey period that considered entitlements to unemployment benefits; each turned upon statutory construction. In a case of first impression, *Gray v. Dobbs House, Inc.*²⁰ elaborated upon the phrase in the Indiana Employment Security Act that denies unemployment benefits to individuals who have voluntarily left their employment without "good cause in connection with the work."²¹ In *Gray*, the claimant accepted employment with the defendant but subsequently quit because of transportation problems and parental obligations. She then filed for unemployment compensation. The Employment Security Board found that while those two reasons made her continued employment with appellee impractical, they did not constitute "good cause in connection with the work."

On appeal, the Second District Court of Appeals stated that to qualify for benefits, a claimant's reasons for leaving employment must be objectively related to the employment. Purely personal and subjective reasons are not encompassed within the phrase "good

¹⁶355 N.E.2d at 449. See also *Elder v. City of Jeffersonville*, 329 N.E.2d 654 (Ind. Ct. App. 1975).

¹⁷355 N.E.2d at 449-50.

¹⁸IND. CODE § 22-6-1-1 to -12 (1976).

¹⁹See discussion of *Elder v. City of Jeffersonville*, 329 N.E.2d 654 (Ind. Ct. App. 1975), and the contrast between applicability of the Anti-Injunction Statute in the private and public sectors in *Archer*, *supra* note 12, at 262.

²⁰357 N.E.2d 900 (Ind. Ct. App. 1976).

²¹IND. CODE § 22-4-15-1 (Supp. 1977) states in pertinent part:

[A]n individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks.

cause."²¹ Thus, the court ruled that parental obligation lacked the same necessary objective nexus to employment as did transportation difficulties, since transportation is solely an employee's responsibility.²² The claimant argued that one who "capitulates" to domestic, financial, or transportation pressures terminates his employment involuntarily and such termination is patently for "good cause." While the court recognized the rationality of this argument, it ruled that benefits could not be conferred on such a basis because of the clarity of the statutory language requiring that the "good cause" be in connection with employment.²³

Although the claimant in *Gray* had sympathies on her side, as well as some logical arguments and foreign precedent,²⁴ the decision is statutorily correct and clearly in line with the purpose of unemployment compensation. Any other ruling by the court would have improperly expanded the concept of "good cause in connection with the work" and made benefits available to any person who decided to quit his employment for almost any reason. Such a result would tax an already burdened unemployment compensation system.

The second decision, also one of first impression in the area of unemployment compensation, was *Bowen v. Review Board of the Indiana Employment Security Division*²⁵ in which Indiana Code section 22-4-15-3(e)²⁶ was judicially examined for the first time. In *Bowen*, plaintiff was a production and maintenance employee who was represented by a labor union. The collective bargaining agreement between the employer and union expired on December 21, 1974. On December 23, the employer placed the plaintiff on "indefinite"

²¹357 N.E.2d at 903 (citing *Geckler v. Review Bd.*, 244 Ind. 473, 193 N.E.2d 357 (1963)).

²²*Id.*

²³*Id.* at 905.

²⁴In *Bateman v. Howard Johnson Co.*, 292 So.2d 228 (La. 1974), it was held that under certain circumstances transportation problems could be considered "good cause in connection with the employment." *Id.* at 230.

Under IND. CODE § 22-4-15-2 (1976), a claimant otherwise eligible for unemployment benefits and not disqualified by reason of *id.* § 22-4-15-1, loses eligibility when "he fails without *good cause*, either to apply for available suitable work . . . , or to accept suitable work when found for and offered to him" *Id.* § 22-4-15-2 (emphasis added). "This provision [§ 22-4-15-2] does not render one disqualified merely because he rejects an offered job, the hours of which are incompatible with his parental obligation." *Gray v. Dobbs House, Inc.*, 357 N.E.2d 900, 904 (1976) (dicta). Claimant argued that with respect to the "good cause" requirement, § 22-4-15-1 and § 22-4-15-2 were equivalent and that the legislature could not have intended the ironical and inconsistent results which would follow by not equating the standards. Nonetheless, while recognizing that the distinction it was drawing could lead to "harsh consequences," the *Gray* court effectuated what it believed to be the "plain import" of those provisions, which demonstrated distinctions disallowing an equation of the two "good will" standards. 357 N.E.2d at 904-05.

²⁵362 N.E.2d 1178 (Ind. Ct. App. 1977).

²⁶IND. CODE § 22-4-15-3(e) (1976).

layoff. On December 30, plaintiff received a notification directing him to return to work on January 6, 1975. However, on January 3, plaintiff's union went on strike and plaintiff refused to return to work. Thereafter, plaintiff unsuccessfully applied for unemployment benefits pursuant to section 22-4-15-3(e), which provides that a person is not ineligible for benefits solely because of his refusal to accept recall during a labor dispute if his last separation from the employer occurred prior to the labor dispute and was for an indefinite period of time.²⁷

In a brief opinion, the Second District Court of Appeals reversed the denial of benefits, finding that the statutory language was unambiguous and therefore needed no judicial interpretation. The court concluded that the claimant met the conditions of the statute because his last separation, on December 23, was prior to the commencement of the strike and no date had been set for his return. The Review Board argued that since plaintiff had been recalled to work three days after the strike began, his separation was no longer for an "indefinite time." The court rejected this argument, observing that the point of reference for that phrase was the employee's "last separation," not his receipt of notice to return to work.

On its facts, the result in *Bowen* appears inequitable because, by statute, striking employees are not entitled to collect unemployment benefits, since they are considered to be voluntarily unemployed.²⁸ Arguably, the same rationale should apply to an individual who is on layoff but recalled prior to a strike, since after the recall his decision to strike and not return to work is just as voluntary as if he had never been on layoff in the first place. The court concluded that permitting collection of benefits under these facts was a conscious extra benefit granted by the legislature. *Bowen's* lesson for employers is not to lay off an employee without setting a tentative date for recall if a strike is imminent; if necessary, this date may be extended as the deadline approaches.

²⁷Section 22-4-15-3(e) provides in full:

(e) Notwithstanding any other provisions of this article, an individual shall not be ineligible for waiting period or benefit rights under this section solely by reason of his failure or refusal to apply for or to accept recall to work or reemployment with an employer during the continuance of a labor dispute at the factory, establishment, or other premises of the employer, if the individual's last separation from the employer occurred prior to the start of the labor dispute and was permanent or for an indefinite period.

²⁸IND. CODE § 22-4-15-3(a) states:

An individual shall be ineligible for waiting period or benefit rights: for any week with respect to which an employee of the division, designated by the director and hereinafter referred to as the deputy, finds that his total or partial or part-total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he was last employed.

XII. Products Liability

*John F. Vargo**

This survey period has been a prolific one in the area of products liability. The courts have discussed various issues, many of which are new to the development of products liability law in Indiana.

A. Landlord-Tenant Relationships

Although recently vacated by the Indiana Supreme Court, the Indiana Court of Appeals opinion in *Old Town Development Co. v. Langford*¹ deserves continued discussion. In *Old Town*, the plaintiff-tenant brought an action against the defendant-landlord and the supplier-installer of an allegedly defective heating system. Plaintiff based his action on negligence, implied warranty of habitability, and strict liability in tort. A jury returned a verdict in favor of the tenant against the landlord; however, the jury found in favor of the supplier-installer. The landlord appealed, contending in part that the trial court had committed error in extending the implied warranty of habitability rationale to leased premises² and in giving instructions on strict liability in tort.³

Writing for the majority of the court of appeals,⁴ Judge Buchanan stated that although the theory of implied warranty of habitability was analogous to the strict liability concepts espoused in products liability cases, the use of the habitability warranty should be restricted to negligent conduct on the part of the landlord when an action is brought under the warranty tort remedy. Judge Buchanan viewed the habitability warranty as rooted in both contract and tort law. However, he believed that no independent ac-

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¹349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977).

²See generally *Theis v. Heuer*, 149 Ind. App. 52, 270 N.E.2d 764 (1971), *aff'd*, 280 N.E.2d 300 (Ind. 1972); *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976).

³The trial court gave instructions which were almost identical to the reasoning contained in *RESTATEMENT (SECOND) OF TORTS* § 402A (1965) [hereinafter cited as § 402A] but revised the Restatement language to accommodate the factual situation. 349 N.E.2d at 765-66.

⁴It is difficult to state the effect of Judge Buchanan's opinion or to even give it "majority" status since Judge Sullivan wrote a concurring opinion which agreed only in part with Judge Buchanan's findings, while Judge White wrote a dissenting opinion. However, although Judge White dissented, he agreed with some of the statements of Judge Buchanan.

tion existed for strict liability in tort, because the tort action was dependent upon the implied warranty of habitability count.⁵

Regardless whether courts and scholars have confused the origin of strict liability as being one in contract or one in tort, the generally accepted view is that strict liability is an independent tort concept.⁶ Judge Buchanan's position that a landlord's liability should be restricted to negligence seems to be an acceptance of either the historical limitations on landlord tort liability,⁷ or Justice Holmes' view that tort law is encompassed by fault or negligence concepts.⁸ Judge Sullivan's concurring opinion takes a more practical approach in recognition of the present condition of the law,⁹ an approach reminiscent of the famous concurring opinion of Justice Traynor in *Escola v. Coca-Cola Bottling Co.*,¹⁰ wherein strict liability was recognized as an existing theory without using legal fictions or devious reasoning. In Judge Sullivan's view, the landlord in *Old Town* was also a builder and, as such, had a responsibility which was independent of his position as a landlord. Although Judge Buchanan considered the plaintiff's counts in strict liability and warranty of habitability to be related, Judge Sullivan emphasized the separate nature of both counts, based on the defendant's dual roles of landlord and builder.¹¹ There are two basic reasons why Judge Sullivan's opinion seems preferable. First, policy considerations seem to dictate the necessity of strict tort liability as a viable separate theory.¹² Prior to Judge Buchanan's opinion, other jurisdictions had recognized strict tort liability for builder-vendors in a variety of situations.¹³ Second, the use of negligence concepts in combination with either *res ipsa loquitur* or negligence *per se*, as done in *Old Town*,¹⁴ is nearly the equivalent of strict liability in tort; and

⁵349 N.E.2d at 766-68.

⁶See § 402A, *supra* note 3, Comment m; W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 75-81, 95 (4th ed. 1971) [hereinafter cited as W. PROSSER].

⁷A summary of landlord tort immunity can be found in Annot., 64 A.L.R.3d 339 (1959).

⁸See Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 276 n.43 (1976).

⁹349 N.E.2d at 789 (Sullivan, J., concurring).

¹⁰24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

¹¹349 N.E.2d at 789 (Sullivan, J., concurring).

¹²*Id.* at 791.

¹³Strict liability has been imposed upon builder-vendors of homes, *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); builder-designers of private homes, *Hyman v. Gordon*, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973); sellers of mass-produced homes, *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); and to sellers of building lots, *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969). See also Ursin, *Strict Liability For Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 U.C.L.A. L. REV. 820 (1975).

¹⁴As part of the negligence count, the plaintiff relied upon *res ipsa loquitur*, 349

this equivalency was one of the primary considerations for the court's recognition of strict liability as an independent doctrine.¹⁵ However, Judge Buchanan attempted to fit the strict tort liability of the landlord-builder into a section 402A framework, a feat similarly attempted by the trial court in *Old Town*. In theory, the requirements of "sale," "seller," "product," and other issues raised in the sale of products under section 402A create difficulties when applying that section to the landlord-builder situation. However, recognition that strict tort liability exists in many situations outside the products liability area¹⁶ might lessen the courts' conceptual difficulties.¹⁷

B. *Pleadings and Parties*

In *Neofes v. Robertshaw Controls Co.*,¹⁸ another landlord-tenant case, the plaintiffs brought an action in the federal court against the manufacturer of an allegedly defective component part of a water heater, which exploded and injured the plaintiffs. The plaintiffs were tenants of a landlord who had purchased the water heater from other parties and had supplied the water heater to the plaintiffs for their use. The plaintiffs based their action on negligence, breach of implied warranties, and strict liability in tort. The defendant moved to dismiss the implied warranties count because he viewed the plaintiffs as improper parties who had failed to come within the protection of section 2-318 of the Uniform Commercial

N.E.2d at 749, and violation of building codes, the latter of which possibly gave rise to allegations of negligence *per se*, *id.* at 750.

¹⁵The first case in Indiana to adopt strict liability was *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965). The court stated that the negation of the privity requirement, when coupled with *res ipsa*, is "hardly different from the theory of strict liability . . ." *Id.* at 430. *See also Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring), wherein Justice Traynor, in discussing the effects of the inferences of *res ipsa*, remarked: "In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability." 24 Cal. 2d at 463, 150 P.2d at 441.

¹⁶In 1958, one article listed 14 areas of strict liability in tort, Comment, 21 NACCA L.J., 427 (1958); in his 1971 edition Dean Prosser mentioned over 20 various situations involving strict liability, W. PROSSER, *supra* note 6, §§ 75-81.

¹⁷It would seem logical that courts should examine whether policy and social considerations require the application of some sort of strict liability; if so, they should determine the proper elements to be applied on a case-by-case basis. Any strict adherence to the elements of legal theories outside the area being examined can lead to many unnecessary semantic gymnastics.

¹⁸409 F. Supp. 1376 (S.D. Ind. 1976).

Code (U.C.C.).¹⁹ The plaintiffs argued that the privity concept contained in section 2-318 was no longer viable in Indiana.²⁰

Assuming that the plaintiffs were bringing their implied warranties count in contract, the court stated that the privity requirement of section 2-318 would prevent plaintiffs' recovery. However, the court reasoned that an implied warranty count which sounds in tort and a count based on strict liability in tort are duplicative and cannot exist in the same lawsuit.²¹ The court's reasoning concerning duplicity is somewhat doubtful, because it necessitates the assumption that the two counts are nearly identical. The U.C.C. requirements for warranties of merchantability and fitness for a particular purpose are completely different from the requirements of section 402A.²² Although the U.C.C. implied warranties have much in

¹⁹U.C.C. § 2-318 is codified at IND. CODE § 26-1-2-318 (1976). Here the defendant's contention addressed the issue of "horizontal privity" as compared to "vertical privity." See Vargo, *1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 270 n.12 (1975).

²⁰Such a statement was made in the recent case of *Wicks v. Ford Motor Co.*, 421 F. Supp. 104, 105 (N.D. Ind. 1976).

²¹The court reasoned that plaintiffs' contentions would be valid under either Alternative B or C of U.C.C. § 2-318; but because of Indiana's adoption of the more restrictive qualifications under Alternative A, IND. CODE § 26-1-2-318 (1976), plaintiff was without a remedy. 409 F. Supp. at 1377-78.

²²Although it is true that both strict liability under § 402A and the implied warranties of § 2-318 require the proof of a defect which causes an injury, the precise requirements under each theory differ considerably. The implied warranty of merchantability generally requires that goods:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

IND. CODE § 26-1-2-314 (1976). The implied warranty of fitness for a particular purpose requires the following:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [§ 26-1-2-316] an implied warranty that the goods shall be fit for such purpose.

Id. § 26-1-2-315.

Section 402A generally requires: (1) A defect must exist at the time the product leaves the seller's hands, (2) the plaintiff must suffer injury, and (3) the injury must have been caused by the defective or unreasonably unsafe condition of the product.

common with section 402A, it would seem unjust to force the plaintiffs to automatically exclude one remedy in favor of another.

Another case that discussed privity was *Wicks v. Ford Motor Co.*²³ The plaintiff brought an action based upon eight counts, including negligence, express and implied warranties, and strict tort liability. Ford moved to dismiss the counts pertaining to the warranties and strict liability, based upon plaintiff's lack of privity. The *Wicks* court rejected Ford's argument, stating: "[These] issues . . . on privity have long since been laid to rest . . ."²⁴ The allowance of implied warranties and strict liability counts in *Wicks* seems to be in direct conflict with *Noefes*. This conflict seems unavoidable because the *Wicks* court should have addressed the privity issue if it viewed the implied warranties count as sounding in contract. Furthermore, if the *Wicks* court believed that the implied warranties count sounded in tort, then it should have forced the plaintiff to dismiss either the strict liability count or the implied warranties count, pursuant to the reasoning of *Noefes*. It would thus appear that Judge Sharp, in writing the *Wicks* opinion, either did not believe that the implied warranties that sound in tort are identical to strict liability in tort and are therefore not duplicative, or he had another viewpoint, such as the possibility of rejecting privity even in implied warranties that sound in contract.²⁵

In *Noefes*, the defendant also contended that strict liability in tort did not extend to the maker of the component part. The court rejected the defendant's position, citing other jurisdictions that have held that component part manufacturers could be held liable.²⁶ The court's position in *Noefes* seems quite reasonable in that it would avoid circuitous litigation by allowing suits against the manufacturers of defective component parts.

Another case discussing who is a proper party in strict liability cases was *Reliance Insurance Co. v. Al E. & C., Ltd.*²⁷ In *Reliance*, the defendant argued that the plaintiff had no standing to sue since the damaged property belonged to another, and plaintiff was merely a subrogee of the bailee of the property. The *Reliance* court rejected the defendant's contention, stating that section 402A applied to a "person or his property" and that "his property" encompassed more than mere owners of chattels. The broad definition which gives the subrogee of a bailee standing to sue was consistent with the Indiana

²³421 F. Supp. 104 (N.D. Ind. 1976).

²⁴*Id.* at 105.

²⁵There is a possibility that Judge Sharp may have been rejecting contract defenses, even when the warranty claims sound in contract under the U.C.C. See Vargo, 1975 *Survey*, *supra* note 19, at 273-74.

²⁶409 F. Supp. at 1380.

²⁷539 F.2d 1101 (7th Cir. 1976).

Court of Appeals decision in *Gilbert v. Stone City Construction Co.*,²⁸ wherein the court stated that liability under section 402A extends to "one who places such a product in the stream of commerce by sale, lease, bailment, or other means."²⁹ The *Gilbert* court also viewed a "bystander" to be a proper party to recover in a strict tort liability action as long as bystander presence was foreseeable.

C. "Strict Construction"

In determining issues which were proffered by the defendant-appellant, the *Reliance* court was confronted with the following statement made by Judge Hoffman in *Cornette v. Searjeant Metal Products, Inc.*,³⁰ a decision by the Indiana Court of Appeals: "Our reading of § 402A . . . and numerous cases applying it, leads us to the conclusion that it should be strictly construed and narrowly applied."³¹ The *Reliance* court flatly refused to apply Judge Hoffman's "dictum" in *Cornette* and rejected any interpretation of defendant's contentions in such a context. Judge Hoffman's "strict construction" rationale was further eroded, if not completely eliminated, in *Wicks*, wherein Judge Sharp, citing his own concurring opinion in *Cornette*,³² stated that the "strict construction" interpretation was the viewpoint of one judge and had not been followed by any other judge in any court or even by the original author.³³ Accordingly, the strict construction language "is not now and never has been a part of the substantive law of Indiana."³⁴

D. Indemnity

One defendant in *Wicks* filed a cross-claim, which the co-defendant moved to dismiss on the basis that the cross-claim was in reality an action in indemnity, and such a claim was incompatible where all the defendants were joint tortfeasors. The *Wicks* court dismissed the cross-claim on the basis of prior case law, holding that where all defendants are alleged to be negligent, they are then considered joint tortfeasors thereby negating the possibility of an in-

²⁸357 N.E.2d 738 (Ind. Ct. App. 1976).

²⁹*Id.* at 742 (emphasis added).

³⁰147 Ind. App. 46, 258 N.E.2d 652 (1970).

³¹*Id.* at 53, 258 N.E.2d at 656-57.

³²*Id.* at 55-56, 258 N.E.2d at 658 (Sharp, J., concurring). Prior to his appointment to the United States District Court for the Northern District of Indiana, Judge Sharp was a judge in the Indiana Court of Appeals and participated in the *Cornette* decision.

³³421 F. Supp. at 105-06 (citing 147 Ind. App. at 55-56, 258 N.E.2d at 658 (Sharp, J., concurring)).

³⁴*Id.*

demnity action.³⁵ Thus, defendants should be forewarned that a plaintiff's complaint containing counts for strict liability in tort or breach of implied warranty against a supplier, wholesaler, or other middleman, may give rise to an indemnity action between such co-defendants. However, if the plaintiff also alleges negligence against each defendant, the right of the defendants to bring an indemnity action disappears.

E. Products and the Stream of Commerce

In *Petroski v. Northern Indiana Public Service Co.*,³⁶ a fourteen year old plaintiff was injured when he touched a "high voltage line" owned by the defendant (NIPSCO). The plaintiff was injured while playing in a tree, such playful activity being the common practice of the neighborhood children. Plaintiff's action was based upon negligence and strict liability in tort. The Indiana Court of Appeals reversed the trial court's granting of NIPSCO's motion for a judgment on the evidence at the end of plaintiff's case-in-chief. On appeal, the plaintiff raised the issue of whether the defendant's distribution of electricity was actionable under the strict tort liability count. The *Petroski* court stated that although electricity was a "product" within the meaning of section 402A, strict liability did not apply in the instant case since the defendant had not yet injected such a product into the "stream of commerce."³⁷ Reasoning that the lines of distribution for the electricity were solely owned by the defendant, the court found that NIPSCO had not placed its product on the market until the electricity actually reached the home or factory of its customer. The strict liability count was therefore inappropriate because the plaintiff was injured while the product (electricity) was still in the defendant's control and *prior* to the placing of the product on the market.³⁸

³⁵*Id.* at 106 (citing *Bituminous Cas. Corp. v. Hedinger*, 407 F.2d 655 (7th Cir. 1969); *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987 (S.D. Ind. 1967); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 278 N.E.2d 295 (1972)).

³⁶354 N.E.2d 736 (Ind. Ct. App. 1976).

³⁷*Id.* at 747. For an explanation of the phrase "stream of commerce," see *Vargo, Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 871, 890-91 (1977) [hereinafter cited as *Vargo, Symposium*]; *Vargo, 1975 Survey, supra* note 19, at 274-75.

³⁸354 N.E.2d at 747. The *Petroski* court reasoned that the electricity had not been placed on the market or put into the "stream of commerce" because the "electricity" was still in possession of the defendant's power lines. This reasoning seems fallacious, however, when one realizes that electricity travels at the speed of light (approximately 186,000 miles per second); thus, once NIPSCO generated the electricity, it would have been impossible to intercept the current. Electricity as a product is constantly being sent and received over power lines at a rate so fast that it would be physically im-

The court's position in *Petroski* seems somewhat narrow and assumes, as most Indiana courts have done in the past, that if the plaintiff alleges strict liability in tort, such a count must come within the bounds of section 402A or it cannot exist.³⁹ Such an assumption seems invalid in view of the many recognized areas of strict liability that do not contain the elements of section 402A.⁴⁰ Courts should be free to examine the facts of each case and the allegations of the parties when deciding whether social and policy goals dictate the application of liability outside of negligence (fault) without strict adherence to the semantics of any theory such as section 402A.⁴¹ A court should be free to determine not only whether strict liability should apply in any particular situation, but also what elements should be applicable to that particular type of strict liability. Thus, in *Petroski*, the court could have applied strict liability to the distribution of electricity by application of the principles of strict liability pertaining to abnormally dangerous activities.⁴² If the *Petroski* court had determined that the distribution of electricity was a risk that was appropriate for non-section 402A strict liability, it would have rendered the section 402A semantics irrelevant as to whether electricity was a "product" and whether it had been injected into the "stream of commerce."

possible to stop the electricity from reaching the market place. This reasoning leads to the conclusion that the point where the electricity reaches the market is at its generation point. The major problem with *Petroski* is the court's attempt to place the production of electricity into the framework of § 402A, whose semantics are simply not appropriate to that activity.

³⁹The same type of problem was encountered by the court in *City of Indianapolis v. Bates*, 343 N.E.2d 819 (Ind. Ct. App. 1976), where the court rejected the use of strict liability when applied against a city. See *Vargo*, 1976 Survey, *supra* note 8, at 268 n.8.

⁴⁰See authorities cited in note 16 *supra*.

⁴¹Such a suggestion has been made in *Vargo*, 1976 Survey, *supra* note 8, at 268 n.8.

⁴²The criteria for determining whether an activity is an "Abnormally Dangerous Activity" are found in *RESTATEMENT (SECOND) OF TORTS* § 520 (1977) [hereinafter cited as § 520]:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Thus, "electricity" may or may not come within the meaning of an "Abnormally Dangerous Activity." However, the comment pertaining to subsection (d) of § 520 states:

The usual dangers resulting from an activity that is one of the common usage are not regarded as abnormal, even though a serious risk of harm can-

F. Negligence v. Strict Liability

Several authors, including Dean Prosser⁴³ and more recently Professor Phillips,⁴⁴ have noted that although there may be vast theoretical differences between negligence and strict liability, the end results attained under strict tort liability are not much different than what is accomplished by the proper application of negligence principles. For instance, in both *Petroski* and *Old Town*, the possible applicability of *res ipsa* and/or negligence *per se* resulted in an imposition of liability that closely resembled strict liability in tort. The real distinction may revolve around the differences between negligence and strict liability concerning burden-of-proof issues and the applicable defenses.⁴⁵ If a court liberally allows jury determination of negligence issues, the resulting liability obtained under either theory becomes practically identical.⁴⁶

G. Contributory Negligence and Assumption of Risk

In *Petroski*, the court of appeals also differentiated between contributory negligence and assumption of risk (incurred risk),⁴⁷ recognizing that "the broad [assumption of risk] defense enunciated in Indiana negligence cases, which rests on an objective reasonable

not be eliminated by all reasonable care. The difference is sometimes not so much one of the activity itself as of the manner in which it is carried on. Water collected in large quantity in a hillside reservoir in the midst of a city or in coal mining country is not the activity of any considerable portion of the population, and may therefore be regarded as abnormally dangerous; while water in a cistern or in household pipes or in a barnyard tank supplying cattle, although it may involve much the same danger of escape, differing only in degree if at all, still is a matter of common usage and therefore not abnormal. *The same is true of gas and electricity in household pipes and wires, as contrasted with large gas storage tanks or high tension power lines.*

§ 520(d) *supra*, Comment i (emphasis added). Thus, the activity of the plaintiff in *Petroski* of touching a high voltage line could be construed to be within the § 520-type of strict liability.

⁴³W. PROSSER, *supra* note 6, § 103.

⁴⁴Phillips, *The Standard For Determining Defectiveness In Products Liability*, 46 U.CIN. L. REV. 101, 103, 111 (1977).

⁴⁵For instance, the defense of contributory negligence is available to the defendant in negligence cases but not in strict liability cases. However, the application of the "misuse" theory may possibly shift the burden of proving contributory negligence to the plaintiff.

⁴⁶See note 15 *supra*.

⁴⁷Indiana decisions limit the term "assumption of risk" to cases where there is a contractual relationship between the parties and use the term "incurred risk" for noncontractual cases. See Vargo, *1975 Survey*, *supra* note 19, at 279 n.48. The discussions which follow will use the term "assumption of risk" in the noncontractual context.

man standard, may be inapplicable to Indiana strict liability cases."⁴⁸ The improper use of such a defense allows contributory negligence "to be brought in the back door" in strict liability cases. The court noted that assumption of risk could arise in either of two situations: the encountering of a known reasonable risk without any possibility of contributory negligence, or the encountering of a known reasonable risk that "overlaps" with contributory negligence.⁴⁹ While the court of appeals did not state that assumption of risk required an actual knowledge, understanding, and appreciation of the risk as evaluated by a subjective standard,⁵⁰ it in fact considered these elements in examining the trial court record.⁵¹

The Indiana Court of Appeals also explored assumption of risk in *Gilbert v. Stone City Construction Co.*,⁵² where a state highway inspector was injured by a road roller leased by Stone City Construction Co. from another defendant. In defining assumption of risk, the *Gilbert* court quoted the traditional definition from *Stallings v. Dick*,⁵³ as cited by the *Cornette* court:

The doctrine of incurred risk is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or could be readily discernible by a reasonable and prudent man under like or similar circumstances.⁵⁴

This definition merely confuses and distorts the doctrine by infusing contributory negligence into its definition.⁵⁵ However, the *Gilbert* court properly applied the assumption-of-risk doctrine by requiring the plaintiff's actual knowledge, understanding, and appreciation of

⁴⁸354 N.E.2d at 745 n.9. The traditional definition of assumption of risk from *Stallings v. Dick*, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965), has been highly criticized by this author in the past. See Vargo, 1976 Survey, *supra* note 8, at 272-73 n.29; Vargo, 1975 Survey, *supra* note 19, at 279 n.48.

⁴⁹The "overlap" is merely the factual area where *both* assumption of risk and contributory negligence coexist. In the "overlap" situation, the plaintiff has met the elements of assumption of risk because he has subjectively and voluntarily encountered a risk with actual knowledge, understanding, and appreciation. The plaintiff has also met the requirements of contributory negligence by "unreasonably" encountering the risk. See RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965).

⁵⁰These requirements, plus voluntariness, are necessary for assumption of risk. See RESTATEMENT (SECOND) OF TORTS § 496A-G (1965).

⁵¹354 N.E.2d at 746.

⁵²357 N.E.2d 738 (Ind. Ct. App. 1976).

⁵³139 Ind. App. 118, 210 N.E.2d 82 (1965).

⁵⁴357 N.E.2d at 746 (emphasis added) (quoting *Stallings v. Dick*, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965), cited in *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 54, 258 N.E.2d 652, 657 (1970)).

⁵⁵See note 48 *supra*.

the risk, as tested by the plaintiff's subjective state of mind.⁵⁶

H. Plaintiff's Burden of Proof and Types of Defects

Gilbert set forth the elements required for a plaintiff to establish a claim under strict liability:

For a plaintiff to establish a products liability claim, it must be shown (1) that he was injured by the product, (2) because it was defective and unreasonably dangerous, (3) that the defect existed at the time the product left the hands of the defendant, and (4) the product was expected to and did reach the consumer without substantial change in its condition.⁵⁷

The final requirement, that the plaintiff prove no substantial change, seems in direct conflict with Judge Sharp's concurring opinion in *Cornette*, wherein he asserted that the issue of substantial change is a defense, which places the burden of proof on the defendant.⁵⁸

In arriving at its decision, the *Gilbert* court stated that a commercial sale was unnecessary, the test being whether the defective product was injected into the stream of commerce. The defect requirement could be met by showing errors in manufacture, design, or the manufacturer's failure to adequately warn or instruct the consumer on the dangers and uses of the product.⁵⁹ The standard to be applied to determine whether a defect existed was the "consumer expectation test," whereby a product was defective if it created an unreasonable danger to the consumer.⁶⁰

I. Safety Devices, Foreseeability, and Misuse

The *Gilbert* court stated that the defect requirement of section 402A can be met if the defendant fails "to cope with foreseeable mishaps . . . by lacking feasible safety devices" on its product.⁶¹ Thus, anyone who comes into contact with a product can expect the supplier or seller to provide safety devices to protect them from the dangers created by the product's design. The *Gilbert* approach

⁵⁶357 N.E.2d at 746.

⁵⁷*Id.* at 743.

⁵⁸147 Ind. App. at 50, 258 N.E.2d at 665 (Sharp, J., concurring).

⁵⁹357 N.E.2d at 743.

⁶⁰*Id.* However, "unreasonable danger" is not to be confused with "unreasonable conduct" in creating the danger, since the latter is mere negligence. "Strict liability" is appropriate regardless of negligence, since the defendant is liable although he has used *all possible care in the preparation and sale of his product*. See § 402A, *supra* note 3.

⁶¹357 N.E.2d at 744.

seems quite logical; however, it came into direct conflict with the Seventh Circuit Court of Appeal's opinion in *Latimer v. General Motors Corp.*,⁶² wherein the court stated that under the theory of strict tort liability there is no element of foreseeability and held that a defendant need not anticipate the misuse of his product or design safeguards against such contingencies.⁶³ This holding imposes an unreasonable limitation on strict liability that is reminiscent of the "no duty" concepts in negligence law. For instance, what if a manufacturer could reasonably foresee the type of use of his product that would amount to misuse? The *Latimer* decision would permit the manufacturer-seller to unilaterally set his own standards of conduct in designing and manufacturing his product without consideration of the environment surrounding the use of his product. This artificial blindness could allow potentially unreasonably dangerous products to reach the marketplace; such a result does not comport with negligence standards, let alone strict liability standards.⁶⁴

J. Second Collision Theory and Design Defects

The *Latimer* decision followed two earlier Seventh Circuit decisions, *Evans v. General Motors Corp.*⁶⁵ and *Schemel v. General Motors Corp.*,⁶⁶ which disallowed recovery for a plaintiff's "enhanced injuries" resulting from a defectively designed vehicle. The *Evans*- and *Schemel*-type cases have commonly been called "second collision cases," because the allegedly defective portion of the vehicle does not cause the original collision, but instead gives rise to an injury from the second impact between the vehicle occupants and the defective part.

In *Huff v. White Motor Corp.*,⁶⁷ the United States District Court for the Southern District of Indiana rejected the plaintiff's contention that the second collision theory should be extended beyond automobiles to tractors. In a decision after the end of the survey

⁶²535 F.2d 1020 (7th Cir. 1976). The decision in *Huff v. White Motor Corp.*, No. 76-2086 (7th Cir. Oct. 4, 1977), *rev'd*, 418 F. Supp. 233 (S.D. Ind. 1976), may bring into question certain holdings in *Latimer*, although *Huff* did not expressly overrule *Latimer*. See textual discussion accompanying notes 65-72 *infra*.

⁶³535 F.2d at 1024.

⁶⁴For an examination of the inherent problems of *Latimer*, see Vargo, *Symposium, supra* note 37, at 878-81. See also note 62 *supra*.

⁶⁵359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), *expressly overruled*, *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977).

⁶⁶384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), *expressly overruled*, *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977).

⁶⁷418 F. Supp. 233 (S.D. Ind. 1976), *rev'd*, 565 F.2d 104 (7th Cir. 1977).

period, the Seventh Circuit subsequently reversed the district court's holding in *Huff* and expressly overruled *Evans* and *Schemel* after determining that Indiana's judicial adoption of the principles of section 402A had implicitly revoked the *Evans* doctrine.⁶⁸

In *Huff*, the plaintiff sued the manufacturer of a tractor, alleging that the defectively designed tractor contributed to the severity of her deceased husband's injuries when the tractor overturned. The district court's summary judgment for the defendant was based upon *Evans*, a minority view in the United States. Prior to the Seventh Circuit's reversal in *Huff*, only Indiana, West Virginia,⁶⁹ and Mississippi⁷⁰ accepted the rule in *Evans*, while thirty-two jurisdictions rejected it.⁷¹ The former vitality of *Evans* was difficult to understand, not because of its minority position but because of its illogical and questionable position on the legal issues such as foreseeability and unintended use.⁷² However, courts have been under-

⁶⁸*Huff v. White Motor Corp.*, 565 F.2d 104, 109 (7th Cir. 1977).

⁶⁹*McClung v. Ford Motor Co.*, 472 F.2d 240 (4th Cir. 1973), *cert. denied*, 412 U.S. 940 (1973).

⁷⁰*Walton v. Chrysler Motor Corp.*, 229 So. 2d 568 (Miss. 1969).

⁷¹*Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976) (Missouri), *cert. denied*, 426 U.S. 907 (1976); *Wooten v. White Trucks*, 514 F.2d 634 (5th Cir. 1975) (Kentucky); *Nanda v. Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974) (Illinois); *Perez v. Ford Motor Co.*, 497 F.2d 82 (5th Cir. 1974) (Louisiana); *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974) (Rhode Island); *Dreisonstok v. Volkswagenwerk*, 489 F.2d 1066 (4th Cir. 1974) (Virginia); *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) (Iowa); *Richman v. General Motors Corp.*, 437 F.2d 196 (1st Cir. 1971) (Massachusetts); *Isaacson v. Toyota Motor Sales, U.S.A. Inc.*, No. 74-18-Civ-4 (E.D.N.C. June 28, 1976); *Anton v. Ford Motor Co.*, 400 F. Supp. 1270 (S.D. Ohio 1975); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969); *Walker v. Int'l Harvester Co.*, 294 F. Supp. 1095 (W.D. Okla. 1969); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); *DeFelice v. Ford Motor Co.*, 28 Conn. Supp. 164, 255 A.2d 636 (1969); *Ford Motor Co. v. Evancho*, 327 So. 2d 201 (Fla. 1976); *Friend v. General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968); *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 553 P.2d 1306 (1976); *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971); *Frericks v. General Motors Corp.*, 278 Md. 304, 363 A.2d 460 (1976); *Rutherford v. Chrysler Motors Corp.*, 60 Mich. App. 392, 231 N.W.2d 413 (1975); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 162 Mont. 506, 513 P.2d 268 (1973); *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974); *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973); *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); *McMullen v. Volkswagen of America*, 274 Or. 83, 545 P.2d 117 (1976); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969), *aff'd on other grounds*, 255 S.C. 136, 177 S.E.2d 546 (1970); *Engberg v. Ford Motor Co.*, 87 S.D. 196, 205 N.W.2d 104 (1973); *Ellithorpe v. Ford Motor Co.*, 503 S.W.2d 516 (Tenn. 1973); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Ct. App. 1974); *Baumgardner v. American Motors Corp.*, 83 Wash. 2d 751, 522 P.2d 829 (1974); *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

⁷²See *Vargo, Symposium, supra* note 37, at 877-81; *Vargo, 1975 Survey, supra* note 19, at 273.

standably reluctant to allow recovery for certain design defects, such as the automobile in *Evans*, because such a result does not merely condemn that particular vehicle, but also all vehicles of the same design. Such a result might prove economically catastrophic under certain conditions, thereby causing the courts to hesitate in taking such steps.⁷³ Thus, any plaintiff who hopes to be successful in any type of "design defect" case should consider presenting "cheaper" alternatives for the court's consideration. Such alternatives might include a warning accompanying the product at a nominal cost to the defendant or a showing that the cost of revision is slight as compared to the total cost of the product.

K. *Warnings and Instructions*

The *Reliance Insurance Co. v. Al E. & C., Ltd.*⁷⁴ decision examined whether the failure to warn constituted a section 402A "defect." The *Reliance* court relied on the reasoning quoted from *Berkebile v. Brantley Helicopter Corp.*⁷⁵ in requiring adequate warnings and instructions, which must reach the ultimate user of the product. The sufficiency of the warning or instruction is tested by a jury in light of the relative degrees of danger of the product. The duty to provide such a warning or make the product safe cannot be delegated to others.

The Indiana Supreme Court's decision in *Nissen Trampoline Co. v. Terre Haute First National Bank*⁷⁶ is in contrast with *Reliance*. Although *Nissen* is considered a procedural case,⁷⁷ its substantive implications are enlightening. Three supreme court justices in

⁷³See W. PROSSER, *supra* note 6, § 96, at 646.

⁷⁴539 F.2d 1101 (7th Cir. 1976).

⁷⁵462 Pa. 83, 337 A.2d 893 (1975). The *Berkebile* court stated:

[T]he sole question . . . is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. *This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence.* The jury should view the relative degrees of danger associated with use of the product since a greater degree of danger requires a greater degree of protection. . . .

Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the products. *The duty to provide a non-defective product is non-delegable.*

Id. at 95, 337 A.2d at 902-03 (emphasis added).

⁷⁶358 N.E.2d 974 (Ind. 1976).

⁷⁷In a procedural decision, the Indiana Supreme Court reversed the Indiana Court of Appeals decision in *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), because of errors in the use of Trial Rule 59.

Nissen could not imagine a type of warning by the defendant that would satisfy the requirements of section 402A.⁷⁸ Their inability may have been due to either the plaintiff's awareness of the dangers and risk involved in the use of the product or the obviousness of such dangers. The majority in *Nissen* apparently did not believe that the requirement to warn was even present in the case.

The *Nissen* case is conceptually difficult because of the need to examine its facts in a step-by-step fashion when evaluating whether the elements of strict liability have been satisfied. Obviously, plaintiff's case rested upon the issue of a warning defect when in fact no warning had been given. Whether or not the defendant was required to warn under the facts of the case was the first and primary issue. If such a requirement existed in the first instance, then the defendant's failure to so warn would establish the defect requirement of plaintiff's case; the only significant remaining issue would be whether the failure to warn caused the plaintiff's injury. The Indiana Court of Appeals, with little discussion,⁷⁹ had found that such a requirement was necessary and then proceeded to discuss the equally difficult issue of causation.⁸⁰ However, the supreme court implied that it did not believe that the defendant was required to give any warning.

The determination of whether to warn is a difficult problem, for in our society we cannot require that all products be covered with pages of warnings. Some lines must be drawn and the exact perimeters of the rules must be somewhat vague by necessity. However, Indiana courts are not without some guidelines as to the applicable standards in warning cases. In *Sills v. Massey-Ferguson, Inc.*,⁸¹ the federal district court stated that the defendant has a duty to provide a safe product and if he cannot provide such a safe product he must communicate the remaining dangers by means of adequate warnings.⁸² The *Sills* requirement seems absolute; however, there remains the possibility that some products may have some degree of danger present and still not require a warning. Whether such products may exist is a policy decision allocated to the courts. Thus, the factors that the court is to consider in determining whether a warning should accompany a risk-producing product is

⁷⁸Justice DeBruler, writing the majority decision in which Chief Justice Givan and Justice Prentice concurred, stated that any attempts at hypothetically surmising what warnings could be given were mere speculation. 358 N.E.2d at 978.

⁷⁹332 N.E.2d at 825. The court of appeals discussed the fact that the manufacturer had discovered the danger in the product by testing.

⁸⁰For a summary of the causation issue, see Vargo, *1976 Survey, supra* note 8, at 277-79.

⁸¹296 F. Supp. 776 (N.D. Ind. 1969).

⁸²*Id.* at 782.

decisive. Although many factors should be considered, it seems that reliance can be placed upon traditional risk-evaluating factors, such as Judge Learned Hand's Risk-Utility Test,⁸³ or more preferably, the factors set out by Dean Wade for defective design cases.⁸⁴ Thus, the following factors should influence the court's decision: usefulness and desirability of the product, the likelihood and seriousness of injury, the availability of substitutes, the manufacturer's feasibility of eliminating dangers, the obviousness of the danger to the user, and the manufacturer's ability to spread the loss.⁸⁵ A court evaluating a case such as *Nissen* should look at all circumstances while formulating its initial decision as to whether a warning must accompany the product. For instance, even assuming that a plaintiff knew that jumping on a platform might result in some injury, there remains the issue of whether he realized the extent of the risk involved and if he did not, would a warning have remedied this situation? A warning might be necessary in certain circumstances where plaintiffs may "forget" the risk involved in the use of the product,⁸⁶ necessitating a continual reminder to such individuals. Although such a risk might be obvious to certain classes of people, a warning may be necessary for other classes of individuals under the same facts. No one individual factor in itself should be determinative of whether a warning is necessary; the initial resolution of such an issue should be made on a more generalized basis than what should

⁸³See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

⁸⁴Dean Wade set forth seven major factors for evaluating a defect:

- (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

⁸⁵*Id.*

⁸⁶See Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 20-22 (1974).

actually be contained in such a warning, and an article can have a degree of dangerousness that is not acceptable in a strict liability case but which may be acceptable in a negligence case.⁸⁷

L. Compliance with Statute and Custom and Usage

In *Gilbert v. Stone City Construction Co.*,⁸⁸ the court rejected the defendant's implication that federal or industrial safety standards should set the standard for a "defect" in strict tort liability.⁸⁹ The court found that compliance with federal safety requirements does not establish the lack of a defect as a matter of law and the standards set by an entire industry can be found to be negligently low if they fail to meet the test of reasonableness.⁹⁰ A similar problem concerning compliance with custom and usage was discussed in *Walters v. Kellam & Foley*.⁹¹ In *Walters*, the plaintiff attempted to introduce evidence concerning the practice in the industry; however, the trial court refused to allow such testimony into evidence. The Indiana Court of Appeals, reversing in part, stated that although prior conduct under conditions similar to the instant trial may be relevant to the establishment of a reasonable conduct on the defendant's part, the standard of care in negligence law is established completely independently of custom and usage. In other words, reasonable care is fixed by law, and the custom and habits of individuals may or may not meet such standards. Quoting Justice Holmes, the court stated: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."⁹²

Thus, custom and usage are admissible to show a composite judgment of risk, feasibility of precautions, difficulty in changing methods, opportunities to learn what is called for, and justifiable expectations of parties.⁹³ Such evidence merely allows inferences as to conformity or non-conformity to a community standard, but one must remember that even a community standard, which is conformed to by all members, may be in violation of the required legal standard.⁹⁴

⁸⁷Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1039 (Ore. 1974).

⁸⁸357 N.E.2d 738 (Ind. Ct. App. 1976).

⁸⁹*Id.* at 745.

⁹⁰*Id.* (citing *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1952), construed in *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 229, 279 N.E.2d 266, 276 (1972)).

⁹¹360 N.E.2d 199 (Ind. Ct. App. 1977).

⁹²*Id.* at 214 (quoting *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470 (1903)).

⁹³See RESTATEMENT (SECOND) OF TORTS § 295A, Comment b (1965).

⁹⁴See text accompanying note 90 *supra*.

XIII. Professional Responsibility

*Charles D. Kelso**

A. Lawyer Advertising

The Code of Professional Responsibility was adopted by the Indiana Supreme Court in 1971.¹ The Code's Canon 2 provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." Nevertheless, the profession's traditional bar on advertising was retained in DR 2-101, which provided that a lawyer was not to publicize himself or his firm through newspaper or magazine advertisements, radio or television announcements, display of advertisements in city or telephone directories, or other means of commercial publicity.

On June 27, 1977, DR 2-101 became obsolete. On that date, the United States Supreme Court decided in *Bates & O'Steen v. State Bar*² that the first amendment does not allow states to prevent certain kinds of lawyer advertising. Specifically, the Court approved the publication of a truthful newspaper advertisement by an attorney concerning the availability and terms of routine legal services, such as uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name, and the like. Mr. Justice Blackmun, who wrote for the Court, stated that the traditional barrier against lawyer advertising "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable."³ He conceded that "advertising does not provide a complete foundation on which to select an attorney," but added that "it seems peculiar to deny the consumer . . . at least some of

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¹The Indiana Code of Professional Responsibility [hereinafter referred to as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA Code].

The Code contains Ethical Considerations, which represent the objectives toward which every member of the profession should strive, and Disciplinary Rules [hereinafter referred to as DRs], which are mandatory in character and state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action.

²97 S. Ct. 2691 (1977) (5-4 decision).

³*Id.* at 2705.

the relevant information needed to reach an informed decision."⁴

Mr. Justice Powell, who dissented, was concerned that allowing lawyers to advertise fees would be misleading to the public. He explained:

Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers. Some members of the public may benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services "almost infinite [in] variety and nature . . .".⁵

The Court's opinion made no mention of broadcast advertising. However, Mr. Justice Powell noted:

No distinction can be drawn between newspapers and a rather broad spectrum of other means, for example, magazines, signs in buses and subways, posters, handbills, and mail circulations. But questions remain open as to time, place, and manner restrictions affecting other media, such as radio and television.⁶

The American Bar Association's House of Delegates, reacting to *Bates*, approved an amendment to Canon 2 of the ABA Code (Proposal "A") and distributed that amendment to the states along with an alternative approach (Proposal "B"). The American Bar Association also authorized its Board of Governors to create (1) a commission on advertising to monitor developments at the local level and within other professions and to make appropriate recommendations and (2) a special committee to study and make recommendations on the feasibility of a nationwide institutional advertising program to educate consumers regarding the utility, cost, and availability of legal services.

Proposal "A" adopts a regulatory approach. It first prohibits false, fraudulent, misleading, deceptive, and self-laudatory or unfair statements or claims. Then it specifically authorizes certain information to be disseminated by print media or radio broadcast in the geographical area in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides. Per-

⁴*Id.* at 2704. Although holding that advertising by attorneys could not be subjected to "blanket suppression," Justice Blackmun also stated that limitations on advertisements were not foreclosed for false, deceptive, or misleading advertisements (which might include advertisements relative to quality of service or in-person solicitation). *Id.* at 2708.

⁵*Id.* at 2719 (Powell, J., dissenting) (footnote omitted).

⁶*Id.* at 2718 n.12 (Powell, J., dissenting).

mitted information includes the lawyer's name, education, memberships, fields of law in which he practices, fee for initial consultation, contingent fee rates, hourly rate, ranges of fees for services, and fixed fees for special legal services.

Proposal "B" adopts a directive or guidelines approach. It first bars the use of any false, fraudulent, misleading, or deceptive statement or claim and then indicates ways in which a statement of claim may be improper under that guideline. The list includes making a material misrepresentation of fact, creating an unjustified expectation, publishing statistical data or other information based on past performance, or predicting future success. Proposal "B" limits fee disclosure to the same kind of information permitted under Proposal "A" and prohibits advertising over television until the agency having jurisdiction under state law determines that the use of such media is necessary and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

The first round of lawyer advertising has been mostly newspaper advertisements limited to statements of fees for particular kinds of services. Such advertising by lawyers should prove beneficial to the public and to the profession. It probably will encourage many people to obtain legal service for problems they otherwise would simply have endured or not met because of fear about excessive costs or ignorance about the availability of a lawyer who wished to handle their kind of problem. Thus, the cost of advertising may be offset by expanded opportunities to serve and a better distribution of legal business. That should be beneficial to new lawyers, particularly to new solo practitioners and to small firms who wish to develop a particular kind of practice.

It seems unlikely that there will be widespread abuse of the new constitutional right by the publication of advertisements that are false or misleading. Lawyers have almost always been restrained in their public utterances. Unlike office conferences regarding fees, an advertisement is beamed out to the general public, which includes other lawyers and disciplinary authorities. Fee disputes, the most common kind of lawyer-client disagreement, might be easier to deal with if the lawyer had stated his or her terms to the public in advance.

Advertising may have some effect to help insure fair fees. Michael Pildes, a Chicago attorney, contends that "his firm's advertised uncontested divorce fee of \$300 plus court costs is a real service to the community because most people don't know what a divorce should cost and therefore end up paying an average of \$750 in the Chicago area."⁷ Evidence that some fees are being reduced as

⁷Wall St. J., Sept. 9, 1977, at 12, col. 3.

the result of advertisements has been cited by Steve Silvern of the Silvern Legal Clinic in Denver. The prevailing fee for handling an individual bankruptcy in Denver, according to Mr. Silvern, has declined to approximately \$200 from \$300 or more since the Silvern clinic began advertising its \$200 bankruptcy rate.⁸

Perhaps we should not make too much of this new freedom. The Yellow Pages will surely contain classifications of lawyers and perhaps some fee information. However, most lawyers probably will not advertise. Their clientele is generated in a manner that does not call for media dissemination of information.

Though much of the discussion of lawyer advertising has been cast in terms of possible fee wars or abuses, it seems likely that the basic underlying argument is a strongly held feeling that advertising is demeaning to the profession and that advertising is lacking in dignity. However, in a consumer oriented age, it surely is not demeaning to inform the public of the services one proposes to provide and the prices one charges for those services when it is done in a factual manner that is not false or misleading. Of course, in tandem with individual advertising, the bar associations could provide a public service if they were to undertake campaigns to educate potential clients about legal fees and services and about how one should go about selecting a lawyer and evaluating the service provided.

A committee of the Indiana State Bar Association has the entire matter of lawyer advertising under consideration, and it is likely that at least a modified version of one of the American Bar Association's proposals, probably Proposal "A," will be recommended to the Indiana Supreme Court. In the past, the court has moved very deliberately in considering amendments to the Code. It is possible, therefore, that guidelines for advertising by Indiana lawyers will not be promulgated and made effective for some months to come.⁹

⁸*Id.* at col. 2.

⁹Mr. John L. Carroll has predicted that the Indiana Supreme Court will promulgate new advertising rules in January of 1978. Carroll, *Supreme Court Hands Down Decision Concerning Lawyer Advertising*, 21 RES GESTAE 352 (1977). State Bar Association President John L. Carey has stated that perhaps the most significant aspect of *Bates* is its holding that restraints on advertising required by a state agency are not subject to attack under the Sherman Act. Carey, *The President's Message*, 21 RES GESTAE 329 (1977). Judge Robert H. Staton of the Indiana Court of Appeals has been exploring the related issue of regulating and allowing public announcement of lawyer specialization. He has discussed the English analogy and has carefully distinguished between the state regulated system of California and the self-designation systems of several other states. Staton, *Lawyer Specialization—Is It Suitable for Indiana?*, 21 RES GESTAE 144, 197, 246, 294, 380 (1977). Judge Staton has stated that the sixth and final installment in his published series on these subjects will appear in March 1978. It will include the results of a questionnaire on specialization distributed

B. Enforcement of the Code

1. *Sanctions for Misconduct.*—In a disciplinary proceeding, when the Indiana Supreme Court adopts findings of fact and concludes as a matter of law that those findings constitute the violation of a DR, the court then has the duty to impose an appropriate disciplinary sanction.¹⁰ The court has used a standard that involves the consideration of various factors, and it is most frequently articulated as follows:

[I]n determining the appropriate discipline to be imposed, consideration is given the nature of the ethical violation; the specific acts of the respondent; this Court's responsibility to preserve the integrity of the Bar of this State; the risk, if any, to which we will subject the public by permitting the respondent to continue in the profession or to be reinstated at some future date; and the deterrent effect the imposition of discipline has on the Bar in general.¹¹

Some idea of what this standard means in action can be inferred by studying the pattern of sanctions meted out in the survey year. In *In re Althaus*,¹² a ninety-day suspension was ordered where

by the court. A special seminar on specialization was held on October 13, 1977. *Id.* at 383.

¹⁰The Indiana Supreme Court explained in *In re Murray*, 362 N.E.2d 128 (Ind. 1977), that it is the function of the Disciplinary Commission to review grievances, dismiss those which are baseless, and then form a complaint that places the alleged misconduct within the structure of the Code. A disciplinary proceeding is an original action in the supreme court for which the court sits as a trial court to determine issues of fact as well as how the Code applies. The findings of a hearing officer appointed by the court are reviewed and considered by the court but are not controlling. It considers the entire record.

The report of the Disciplinary Commission for the period commencing October 1, 1975, and ending September 30, 1976, appears in INDIANA STATE BAR ASSOCIATION, INDIANA SUPREME COURT DISCIPLINARY COMMISSION ANNUAL REPORT, reprinted in 21 RES GESTAE 28 (1977). The report notes the investigation of 260 complaints in 1973-1974; 431 in 1974-1975; and 310 in 1975-1976. It also contains statistics on complaints by kind of misconduct alleged and the subject matter of each case. Torts, domestic relations, and criminal cases gave rise to the largest volume of complaints. Neglect was the largest category of complaint.

In his State of the Judiciary Annual Address, Chief Justice Richard M. Givan noted that from October 1975 to October 1976, the court had administered 3 private reprimands, 5 public reprimands, had ordered 6 suspensions for periods of 30 to 180 days, had decreed 1 disbarment, and had allowed 3 reinstatements. State of the Judiciary Annual Address by Chief Justice Givan, reprinted in 21 RES GESTAE 49,51 (1977).

¹¹*In re Merritt*, 363 N.E.2d 961, 971 (Ind. 1977).

¹²348 N.E.2d 407 (Ind. 1976). A 90-day suspension was also handed down in *In re Case*, 354 N.E.2d 198 (Ind. 1976), where an attorney was convicted for failing to file a federal income tax return several years before the Code had been promulgated by the

money collected for a client was commingled in the lawyer's own account for a year, and he did not file a divorce for which he had collected a retainer, which was not returned even though he initially had said that it would be returned. A more severe sanction was imposed in *In re Noel*,¹³ where the lawyer commingled funds, neglected legal matters, and failed to make an appropriate record or accounting of client funds. The hearing officer had recommended a public reprimand, but the court imposed a 180-day suspension, commenting:

The fiduciary relationship of a lawyer to this client involves trust. There is no surer way to undermine this trust than to become involved in questionable and unethical conduct in dealing with funds that belong exclusively to a client. This type of misconduct reflects adversely upon a lawyer's fitness to continue the practice as well as brings severe discredit to the legal profession.¹⁴

Finally, in *In re Wood*,¹⁵ a one-year suspension was given a lawyer who offered his legal services in exchange for sexual favors—posing for nude photographs. The court said that "it does not, cannot, and will not attempt to establish guidelines for the sexual activities of the members of the bench and bar."¹⁶ However, the court stated the following:

The sexual activities of the respondent in this cause were not personal and unrelated to his practice of law. He attempted to exchange legal services for sexual favors. . . . It is this improper combining of professional and personal interests which establishes his unfitness to practice law and constitutes a violation of Disciplinary Rule 1-102(A)(6).¹⁷

During the survey year, five attorneys were disbarred. Disbarment is a sanction not frequently imposed. It appears that it will be used in only very extreme cases. In *In re Wallace*,¹⁸ the attorney had commingled funds, neglected to carry out his duties, failed to promptly make good on personal checks returned for insufficient funds, and even forged a judge's name on an alleged decree. In *In re Conner*,¹⁹ an attorney was disbarred for having neglected to process

court. Retroactive application of the Code was approved several years ago. *In re Mullin*, 261 Ind. 444, 305 N.E.2d 779 (1974).

¹³350 N.E.2d 623 (Ind. 1976).

¹⁴*Id.* at 627-28.

¹⁵358 N.E.2d 128 (Ind. 1976).

¹⁶*Id.* at 133.

¹⁷*Id.*

¹⁸354 N.E.2d 213 (Ind. 1976).

¹⁹358 N.E.2d 120 (Ind. 1976).

with dispatch legal matters entrusted to him by several clients, for having failed to keep commitments to make restitution of unearned fees paid in advance, and for having failed to live up to commitments to the Disciplinary Commission with respect to taking care of his obligations to creditors and with respect to dealing with his drinking problem. The court noted that personal hardships and misfortunes, compounded by the disease of alcoholism, had led to the destruction of the respondent's personal career. However, the court added: "It is this Court's responsibility to safeguard the public from attorneys who, for whatever reason, are no longer fit to honor the trust that forms the basis of the attorney-client relationship."²⁰ In *In re Tabak*,²¹ the attorney was disbarred because while serving as a judge pro tempore in criminal court, he sought out the tickets of several of his clients, found the clients guilty (without their knowledge), and then suspended the sentences. The court said: "This conduct ignores any concept of trust and responsibility and demonstrates a total disregard to the ethical requirements of all attorneys and judges."²² Disbarment was also mandated in *In re Merritt*,²³ where eight different counts were established against the respondent (who was living in Alabama). They encompassed the following acts: closing his law office without making arrangements for having court notices picked up on cases pending; arranging through deceit to have a real estate agent visit one of his clients while the client was in prison; failing to pay over to clients money that was due to them; failing to appear in court to defend clients at scheduled hearings; terminating employment because of the nonpayment of a fee and not making arrangements to protect the client's rights; withdrawing money from a client's trust account, using it for personal purposes, and not replacing it; and leaving the jurisdiction without notifying clients that he would be unable to appear at a scheduled trial date. Finally, in *In re Murray*,²⁴ an attorney was disbarred after having committed twenty-nine different violations of the Code including:

using perjured testimony, making false statements of fact and law, participating in the creation of false evidence, failing to reveal to the trial tribunal the existence of fraud perpetrated by clients and witnesses, allowing a third person to direct and regulate professional judgment, engaging in conduct prejudicial to the administration of justice, and ac-

²⁰*Id.* at 123.

²¹362 N.E.2d 475 (Ind. 1977).

²²*Id.* at 477.

²³363 N.E.2d 961 (Ind. 1977).

²⁴362 N.E.2d 128 (Ind. 1977).

quiescing in the payment of witnesses for favored testimony.²⁵

In addition to disbarring five lawyers, the court accepted the resignation of two lawyers who admitted that charges against them were true and that they could not defend against them.²⁶ One of the attorneys was barred from seeking reinstatement for five years,²⁷ the other for two.²⁸ Partially offsetting these departures, two attorneys were reinstated.²⁹

The Indiana Supreme Court did not amend Indiana's version of the Code during the survey year, nor was the court called upon to make an interpretation of the Code (other than the interpretations implicit in applying the Code to fairly typical disciplinary situations).³⁰ In none of the reported cases did the court reject the findings of a hearing officer that the respondent had been guilty of misconduct. This is some evidence that the Disciplinary Commission is engaged in a selective enforcement policy; it brings formal proceedings in only the most blatant cases. Although disputes over fees constitute a substantial percentage of the complaints, no attorney was sanctioned by the court for charging an unreasonable fee. Perhaps part of the explanation is that in cases where the fee might have been unreasonable the attorney may also have been guilty of a more easily provable violation, such as neglect.

2. *Disqualification*.—The Code's Canon 9 provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The courts occasionally enforce this Canon by granting a motion to disqualify a lawyer, and sometimes his firm, from a particular case. Useful guidelines for Indiana attorneys were set forth by the Seventh Circuit Court of Appeals in *Schloetter v. Railoc of Indiana, Inc.*³¹ The court of appeals affirmed the district court's disqualification of defendant's counsel because a lawyer associated with that firm had previously represented the plaintiff on a subject matter closely related to the present litigation. Specifically, an attorney

²⁵*Id.* at 137.

²⁶See IND. R. ADMISS. & DISCP. 23(17).

²⁷*State v. Barger*, 352 N.E.2d 487 (Ind. 1976).

²⁸*In re Laib*, 357 N.E.2d 895 (Ind. 1976).

²⁹*In re Noel*, 359 N.E.2d 920 (Ind. 1977); *In re Perrello*, 360 N.E.2d 588 (Ind. 1977).

³⁰Two opinions were issued by the state bar association. 21 RES GESTAE 126 (1977). Opinion number 1 ruled that a lawyer may not allow his name to be used in a referral list not distributed, sponsored, or approved by a local bar association. *Id.* Opinion number 2 ruled that an attorney may write newspaper articles and appear on local television concerning general legal topics for the education of the public. However, it would be improper, the opinion said, for the lawyer to use those forums to solicit professional employment. *Id.* The *Bates* case obviously makes some inroad on this ruling.

³¹546 F.2d 706 (7th Cir. 1976).

who continued to maintain a substantial relationship with the law firm that represented defendant had represented the plaintiff in procuring the patent whose validity was placed in issue by the defendant in this litigation. The court said that it was mindful of the need to preserve a balance between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. However, the court stated the following:

The basic policies underlying any judicially-compelled withdrawal of counsel because of a potential conflict of interest can be found in Canons 4 and 9 of the ABA Code of Professional Responsibility. Canon 4 provides that "a Lawyer Should Preserve the Confidences and Secrets of a Client," and Canon 9 provides that "a Lawyer Should Avoid Even the Appearance of Professional Impropriety." Read together, the two canons indicate that an attorney *may* be required to withdraw from a case where there exists even an appearance of a conflict of interest.³²

In the case at bar, the court said the subject matter of the present litigation was substantially related to the prior representation. In this type of situation, the court will presume that confidential information relating to the matter passed to the attorney during the former representation. There had been no evidentiary showing to dispel that presumption. However, the court said that even if the defendant's attorneys had not been exposed to confidential information disclosed during the course of Mr. Jeffery's former representation of the plaintiff, the district court was well within the bounds of its discretion in disqualifying the defendant's firm because of the *appearance of impropriety*. "The rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information. . . . *A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one.*"³³

The court of appeals distinguished two decisions relied upon by the defendant³⁴ on the grounds that in both cases a young associate left the employ of a large law firm now representing the plaintiff to join another firm now representing the defendant, but the associate had not been exposed to any matter substantially related to the sub-

³²*Id.* at 709.

³³*Id.* at 711 (quoting *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1384, (3rd Cir. 1972) (emphasis in original)).

³⁴*Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

ject matter of the pending action during his tenure at the firm now representing the plaintiff. “[I]f there existed any appearance of impropriety, it was *de minimis*,”³⁵ according to the court. To have disqualified the plaintiff’s law firm under those circumstances “would have meant depriving the client of the right to counsel of his own choosing without, at the same time, materially fostering high ethical standards of professional responsibility of public confidence in the legal profession.”³⁶

C. Conduct and Powers of the Prosecutor

The prosecutor cannot pursue a case with quite the same kind of zeal that is the duty of other advocates. DR 7-103 requires that the prosecutor in criminal litigation make timely disclosure to counsel for the defendant of the existence of evidence that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Still, the prosecutor is not deprived of all power to act as an advocate. This point was emphasized in *Ortiz v. State*.³⁷ In his closing argument, counsel for defendant said: “The person who took the life of Gregory Hill is still walking free waiting to take the life of someone else.”³⁸ In rebuttal, the prosecutor stated: “[L]adies and gentlemen, the killers of Mr. Ortiz and Mr. Williams are not endangering the lives of Gary and running around the street. They are here in court today.”³⁹ When defense counsel objected, the prosecutor apologized to the jury for injecting personal opinion and urged them to look solely to the evidence.

On appeal, the defendant argued that the prosecutor’s statement violated DR 7-106(C)(4) because it was an assertion of personal opinion as to the guilt of the accused. The court said: “The evil to be avoided by this rule is that the jury will infer that counsel has superior or inside knowledge of the case, and will therefore give his opinion evidentiary effect.”⁴⁰ Testing the incident by this standard, the court concluded that while it is always preferable that counsel cast conclusions in forms that clearly indicate that the remarks are based upon counsel’s interpretation of the evidence, the prosecutor’s statement was not impermissible. The court explained:

The prosecutor’s remark implies no personal knowledge, notwithstanding the absence of explicit reference to the

³⁵546 F.2d at 712.

³⁶*Id.*

³⁷356 N.E.2d 1188 (Ind. 1976).

³⁸*Id.* at 1196.

³⁹*Id.*

⁴⁰*Id.*

evidence, but was made to rebut the rhetorical effect of Ortiz's attorney's assertion that the guilty parties were still at large. Retaliatory responses of this sort are not to be encouraged. However, when kept within reasonable bounds, they are to be judicially tolerated if the values of spirited advocacy are not to be lost altogether.⁴¹

In *In re Daley*,⁴² a case arising in Illinois, the Seventh Circuit Court of Appeals held that a federal prosecutor's power to grant immunity is limited to future criminal proceedings and does not extend to state bar disciplinary proceedings growing out of the witness' compelled testimony. The witness, under a grant of immunity explicitly including both United States criminal statutes and state bar disciplinary proceedings, had admitted before a grand jury that he had bribed a public official in order to assure the granting of zoning variances favorable to his developer clients. The court said that the legislative history of the federal statute authorizing prosecutors to grant immunity showed an intent to restrict the statute's scope of immunity to that which is constitutionally required. The fifth amendment, in turn, prohibits compelled testimony from being given only in criminal proceedings. However, the court held that bar disciplinary proceedings are not criminal in nature; they seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Accordingly, the state bar disciplinary proceedings could continue, and the compelled testimony could be used.

D. Claims of Incompetent Counsel in Criminal Cases

The Indiana appellate courts reviewed a number of appeals from denial of petitions for post-conviction relief which alleged that the defendant had not received effective assistance of counsel. The courts used a standard unlike that applied to determine misconduct under the Code.⁴³ Hence, in *Kerns v. State*,⁴⁴ the court said: "[A]bsent a glaring and critical omission or succession of omissions evidencing in their totality a mockery of justice, this Court will not attribute a criminal conviction of affirmation to ineffective representation."⁴⁵

⁴¹*Id.* at 1196-97.

⁴²549 F.2d 469 (7th Cir. 1977).

⁴³IND. R. ADMISS. & DISCP. 23(2)(a) provides: "Any conduct that violates the Code of Professional Responsibility or the Code of Judicial Conduct and Ethics heretofore adopted or as hereafter modified by this Court or any standards or rules of legal and judicial ethics or professional responsibility hereafter adopted by this Court shall constitute grounds for discipline."

⁴⁴349 N.E.2d 701 (Ind. 1976).

⁴⁵*Id.* at 703.

In *Kerns*, the defendant had been convicted of first degree murder. Among the specific allegations made by Kern to support his contention of ineffective counsel were that his counsel's investigation of the case was inadequate, that counsel called no witnesses on defendant's behalf, and that counsel failed to file a plea of insanity. The supreme court, in rejecting Kerns' claim, stated that an attorney is strongly presumed to be competent and that mere "allegations of incompetence, even if unrefuted, are not alone sufficient to rebut the presumption of competence."⁴⁶ Hence, since the defendant failed to show which witnesses the trial counsel had failed to interview or what exculpating evidence counsel had failed to discuss, the court was unable to find anything in the record to warrant a charge of ineffective counsel. Additionally, the court stated that the defense of insanity, which counsel did not raise, was not susceptible to review, since such omission whether detrimental or beneficial was speculative where unsupported by the record.⁴⁷

Another consideration not discussed in *Kerns*, but used in other cases, is that not only must counsel cause a situation amounting to a mockery of justice that is shocking to the conscience of the reviewing court, but, more importantly, the defendant must be able to prove some specific harm caused by counsel's alleged inattention.⁴⁸

In *Cade v. State*,⁴⁹ the defendant was convicted of first-degree murder and homicide while in the perpetration of a burglary. On appeal, the defendant alleged, among other things, that he was denied the right to effective assistance of counsel, since during the course of the proceeding he was represented by three different attorneys. Interestingly, the incompetence of counsel was not alleged to be a contributing factor to defendant's unfavorable verdict.⁵⁰ Instead, the issue raised on appeal was "whether or not someone, as in the case of this Appellant, can receive effective assistance of counsel where three or more attorneys representing the accused at various and critical stages of the proceedings operating on separate theories and varying degrees of zealously can ultimately result in effective representation."⁵¹ The Indiana Supreme Court held that although a defendant is entitled to consult with counsel in every stage of the proceedings against him⁵² and although counsel should have an ade-

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Smith v. State*, 353 N.E.2d 470, 472 (Ind. Ct. App. 1976).

⁴⁹348 N.E.2d 394 (Ind. 1976).

⁵⁰*Id.* at 397.

⁵¹*Id.*

⁵²*Id.* at 398.

quate opportunity to prepare for a "zealous and active defense,"⁵³ the defendant failed to present facts to show that he was not "afforded this right."⁵⁴

It should be noted that some federal courts have used a different standard with respect to issues raised on appeal concerning inadequate representation of counsel. In *United States ex rel. Ortiz v. Sielaff*,⁵⁵ the test was whether counsel's performance met "a minimum standard of professional representation."⁵⁶ The court stated: "Much depends on the nature of the charge, of the evidence known to be available to the prosecution, of the evidence susceptible of being produced at once or later by the defense, and of the experience and capacity of defense counsel."⁵⁷ The facts in *Sielaff* revealed that counsel spent approximately three minutes immediately before trial interviewing alibi witnesses. Also, counsel failed to move for suppression of defendant's incriminating statement and identification. The court held that defendant was not denied the right to effective counsel, noting the charge (robbery), the straightforward case made by the prosecution and known to defense counsel, the strong witness identification, the limited use of an otherwise suppressible statement, and the trial counsel's past experience. Moreover, defendant did not at any time show how his attorney's alleged inadequate representation prejudiced his defense.

Similarly, in a number of other post-conviction proceedings the defendant failed to show that there had been a denial of effective counsel.⁵⁸

⁵³*Id.*

⁵⁴*Id.*

⁵⁵542 F.2d 377 (7th Cir. 1976).

⁵⁶*Id.* at 379.

⁵⁷*Id.* at 380.

⁵⁸*Parsley v. State*, 354 N.E.2d 185 (Ind. 1976) (counsel's failure to interpose insanity plea did not constitute ineffective representation); *Loman v. State*, 354 N.E.2d 205 (Ind. 1976) (defendant was not deprived of effective assistance of counsel by virtue of his attorney's failure to subpoena his sole alibi witness, in light of fact the defense counsel had previously interviewed prospective witness and found that his testimony would not establish alibi); *Dunn v. State*, 355 N.E.2d 870 (Ind. Ct. App. 1976) (that counsel only briefly on three occasions consulted with defendant was insufficient to overcome presumption that defendant was effectively represented by counsel).

XIV. Property

*Debra A. Falender**

Several judicial and statutory developments involving property rights occurred in Indiana during the survey period. The discussion of the most significant cases and statutes will be presented under the following general headings: (1) landlord-tenant relationships, (2) adverse possession and partition, (3) real estate contracts, (4) survivorship rights, (5) easements, (6) covenants, (7) condemnation, and (8) horizontal property law. Other cases that are not discussed in detail in this Article and do not fall into the above categories involved: surface water,¹ oil and gas leases,² zoning,³ deeds and equitable

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¹In *Cloverleaf Farms, Inc. v. Surratt*, 349 N.E.2d 731 (Ind. Ct. App. 1976), the court reapplied the rule that a *lower* property owner may dam against surface water to prevent it from entering his land and is not liable for damages resulting to the *upper* property owner from any accumulation or changed flow of water above the obstruction so long as he does not collect the water in a body and discharge it on another's land.

²In *Citizens By-Products Coal Co. v. Arthalony*, 351 N.E.2d 57 (Ind. Ct. App. 1976), the court of appeals ruled that the fixed one-year term of an oil and gas lease could not be extended by a dry hole clause that was rendered meaningless by deletion of all provisions for delay rental. *Accord, Freeland v. Edwards*, 11 Ill. 2d 395, 142 N.E.2d 701 (1957).

³In *Metropolitan Bd. of Zoning Appeals v. Graves*, 360 N.E.2d 848 (Ind. Ct. App. 1977), the court of appeals held that the trial court may reverse the Board's denial of a use variance only if each of the five statutory prerequisites has been established as a matter of law by evidence "such that no reasonable man could fail to accept that prerequisite as proved." *Id.* at 851. The trial court had erroneously reversed the denial on its finding of "substantial evidence of probative value" establishing the five prerequisites. The function of the trial court is to ascertain whether there is "substantial evidence of probative value" to *support* the Board's findings. *See Fail v. LaPorte County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976) (also holding that a hardship claim is available to a purchaser with knowledge of the zoning requirements).

In *Minton v. State*, 349 N.E.2d 741 (Ind. Ct. App. 1976), the appellate court held that denial of an application for a building permit is a determination properly reviewable by the Board of Zoning Appeals pursuant to IND. CODE § 18-7-5-82 (1976), and the Board's decision is reviewable by certiorari if the statutory procedures of section 18-7-5-88 are complied with. However, since property owners who appeared before the Board in opposition to the applicants were not served with notice of the petition for writ of certiorari, the trial court was without jurisdiction of the case. Section 18-7-5-88 clearly makes the opponents necessary and indispensable parties in a certiorari proceeding.

mortgages,⁴ and the right to access to public streets.⁵

A. *Landlord-Tenant Relationships*

From 1975 until mid-1977, it seemed that Indiana courts were moving consistently and steadily in the direction of the acceptance of contract principles in the landlord-tenant situation. In 1975, the First District Court of Appeals applied the contract doctrine of mitigation of damages in the landlord-tenant context.⁶ However, this year the same court, in *Roberts v. Watson*,⁷ did not take the opportunity to adopt the anticipatory repudiation doctrine. The *Roberts* court, citing *Booher v. Richmond Square, Inc.*,⁸ held that in an action

⁴In *Guido v. Baldwin*, 360 N.E.2d 842 (Ind. Ct. App. 1977), the trial court determined that grantors, who reserved a "small cottage and a half acre garden plot" out of an eighty acre tract, owned approximately an acre of the tract. The court of appeals affirmed, holding that (1) ambiguous reservations in deeds are construed against the grantor only if the evidence establishes that the deed was drafted by the grantor, and (2) deeds "will be construed in the light of all surrounding circumstances as well as the subsequent acts of the parties to the conveyance by which they construed it themselves." *Id.* at 847. A letter written by the grantor subsequent to the deed was a subsequent act of a party to the deed evidencing the grantor's intent, even though arguably the letter was a self-serving statement.

In *Moore v. Linville*, 352 N.E.2d 846 (Ind. Ct. App. 1976), the court reviewed the factors that indicate an intent to create an equitable mortgage: for example, the fact that grantor is indebted to grantee, grantor is given the right to redeem, grantee paid inadequate consideration, grantor paid interest to grantee, grantor retained possession without paying rent, grantor improved the real estate, or grantee exercised no control over the property. In *Moore*, although consideration of all the factors indicated the intent to create an equitable mortgage, the trial court could have found that the grantor lost his right to redeem by failing to "do equity." The grantor did not insure the property, pay taxes and assessments as agreed, or repay the grantees.

⁵In *City of Muncie v. Pizza Hut, Inc.*, 357 N.E.2d 735 (Ind. Ct. App. 1976), the court of appeals held that the trial court did not abuse its discretion when it mandated the city to allow Pizza Hut ingress and egress to its property from an abutting public street, even though Pizza Hut had access from another abutting public street. An owner of a lot abutting a street has an interest in having access to the street, which cannot be denied by the exercise of police power unless "public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, [or] order." *Id.* at 737 (quoting *Chicago, Terre Haute, & Se. Ry. v. Anderson*, 182 Ind. 140, 143, 105 N.E. 49, 51 (1914)).

⁶*Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E.2d 833 (Ind. Ct. App. 1975), noted in *Polston, Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 302 (1976). See also *State v. Boyle*, 344 N.E.2d 302 (Ind. Ct. App. 1976) (landlord must use reasonable diligence to relet the premises in mitigation of damages upon abandonment by the lessee).

⁷359 N.E.2d 615 (Ind. Ct. App. 1977).

⁸310 N.E.2d 89 (Ind. Ct. App. 1974), noted in *Polston, Property, 1976 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 228 (1974). The *Booher* court, in denying tenant's res judicata defense, held that the landlord may bring successive actions for rent as it comes due.

for rent the landlord may recover the rent due and unpaid, but not rent not alleged to be due at the time the action is brought.⁹ Thus, the landlord must either wait until the end of the lease term to sue or bring successive actions for the difference between the rent agreed upon and the fair rental value or rent received in the effort to mitigate.¹⁰ If the *Roberts* court had remanded the case with instructions that the trial court consider as damages all rent reserved under the lease less fair rental value or rent received from any reletting, it would have established Indiana's commitment to the application of contract principles in the landlord-tenant relationship.¹¹

In 1976, Judge Buchanan of the Second District Court of Appeals wrote the landmark decision of *Old Town Development Co. v. Langford*,¹² holding that residential apartment leases are contracts consisting of mutually dependent covenants including a two-part implied warranty of habitability.¹³ A petition was filed to transfer the

⁹359 N.E.2d at 621. In *Roberts*, when the landlord brought the action in October 1973, lessee had paid only the first month's rent (July 1973). The most the landlord could have been awarded, said the appellate court, was \$833.32, the due but unpaid rent for August and September. The trial court had awarded \$16,531 in damages for breach of the five-year lease.

¹⁰If the landlord makes a reasonable good faith effort to relet, he should recover the reserved rent until he is able to relet. When the landlord does relet the premises, the rent received should be taken as the fair rental value of the premises in ordinary circumstances. See Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Cross-roads*, 10 IND. L. REV. 591, 640 (1977).

¹¹In *Roberts*, landlord's actions in October 1973 in taking possession and using the premises may have been "so inconsistent with the subsisting relationship of landlord and tenant, that it may be implied that both lessor and lessee have agreed to consider the lease as ended." Northern Ind. Steel Supply Co. v. Chrisman, 139 Ind. App. 27, 33, 204 N.E.2d 668, 671 (1965). The question of implied termination is one for the trier of fact. If an implied termination had occurred, landlord could only recover rent reserved less fair rental value or rent received until the time of the implied termination.

¹²349 N.E.2d 744 (Ind. Ct. App. 1976), vacated, 369 N.E.2d 404 (Ind. 1977). This decision received extensive review in recent issues of the *Indiana Law Review*. See Krieger & Shurn, *supra* note 10; Polston, *supra* note 6, at 304. Judge Sullivan specially concurred, and Judge White dissented.

¹³The first part of the "bifurcated" implied warranty of habitability consists of the landlord's warranty that the leased premises are free from latent defects rendering them uninhabitable for residential purposes. The second part of the warranty consists of a promise by the landlord that the premises will remain reasonably fit for residential purposes during the entire term of the lease. Necessarily this promise carries with it an implied duty to repair. Upon breach of the implied warranty, the landlord is liable to his tenant for all traditional contract damages arising from breach. The landlord is also liable under traditional negligence principles for any personal injury or property damage.

The recognition of an implied warranty of habitability in residential leases has occurred in several jurisdictions as a result of a reevaluation of common law doctrines (e.g., caveat lessee, independent covenants in leases, tort immunity of landlords) in light of contemporary social and economic conditions. See, e.g., *Javins v. First Nat'l*

case to the Indiana Supreme Court for review, but subsequently the parties settled the lawsuit and filed a petition for stipulation of dismissal of the petition to transfer. In November 1977, the Indiana Supreme Court granted the petition to transfer and then dismissed the case as moot because of the settlement.¹⁴ By granting the petition to transfer, the Indiana Supreme Court has erased the court of appeals decision from the books. Technically, *Old Town* does not exist or have any precedential effect;¹⁵ and the supreme court, by summarily dismissing the case after granting transfer, has left nothing in its place. For the present, then, Indiana tenants, landlords, lawyers, and trial courts must deal with pre-*Old Town* cases which apply and embrace the common law doctrines of caveat lessee,¹⁶ independent covenants,¹⁷ and the landlord's general tort immunity.¹⁸

In another landlord-tenant case, *Indiana State Highway Commission v. Pappas*,¹⁹ the law appears harsh in its application.²⁰ Pappas operated a business on land that the Indiana State Highway Commission sought to condemn. In 1968, Pappas deeded the land to the state in return for \$12,600. He was later told by a representative of the Commission that he could pay rent and remain on the land until he found replacement property. Pappas signed a one-year lease, but at the end of the year, in spite of diligent efforts, he had not found replacement property and in fact did not find such property until

Realty Corp., 428 F.2d 1071 (1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

¹⁴*Old Town Development Co. v. Langford*, 369 N.E.2d 404 (1977).

¹⁵The effect of granting a petition to transfer is that the court of appeals decision is "vacated and held for naught." IND. R. APP. P. 11(B)(3). Practically, however, *Old Town* does indicate how the three judges of the Second District Court of Appeals will respond in another case raising the same issues.

¹⁶*E.g.*, *Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953). *But see Weaver v. American Oil Co.*, 257 Ind. 458, 463-64, 276 N.E.2d 144, 147-48 (1972) (dicta) ("Caveat lessee is no more the current law than caveat emptor."); *Theis v. Heuer*, 149 Ind. App. 52, 62 n.1, 280 N.E.2d 300, 305 n.1 (1972) (dicta) ("Modern case law is now finding an implied warranty of habitability by a landlord to his tenant.").

¹⁷This doctrine stems from the conception of a lease as a conveyance rather than a contract.

¹⁸*E.g.*, *Hanson v. Cruse*, 155 Ind. 176, 57 N.E. 904 (1900); *Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

¹⁹349 N.E.2d 808 (Ind. Ct. App. 1976), *transfer denied*, 360 N.E.2d 1 (Ind. 1977).

²⁰A justice of the Indiana Supreme Court, in dissenting to denial of transfer of the case, stated: "The treatment of this condemnee [lessee] by the state exercising its power of eminent domain has been nothing short of scurrilous." 360 N.E.2d at 1 (Hunter, J., dissenting).

1972. At the end of the lease year and monthly thereafter until 1972, Pappas talked to representatives of the Commission about his problems in finding property, and the Commission each time allowed him to remain in possession for an additional thirty days.

In 1970, the Commission cut lines carrying special electrical service to Pappas' machine shop, and consequently Pappas was unable to operate his business for more than two years. The trial court awarded Pappas damages of \$30,000, including \$18,000 for the replacement cost of the electrical service²¹ and \$12,000 for lost earnings for the entire two and one-third year period. The Indiana Court of Appeals agreed that the Commission was liable to Pappas for termination of the electrical service, but held that damages were erroneously assessed for a period longer than the unexpired term of the leasehold. At the time of the landlord's tort, Pappas was a tenant at sufferance²² with permission to remain on the premises for only thirty days from the last prior extension by the Commission. Pappas could recover loss of value of the use of his shop only for the duration of that thirty-day period.

B. Adverse Possession and Partition

Of the adverse possession cases decided during the survey period,²³ the most significant was the Indiana Court of Appeals'

²¹The court of appeals held that the \$18,000 awarded for the replacement cost of wiring was inappropriate because Pappas was not forced to install wiring in the replacement property as a consequence of the Commission's tortious cutting of wires at his original shop. 349 N.E.2d at 813.

²²After the expiration of the one-year lease term, the Commission refused to accept rent for Pappas' use of the premises. *See Cargar v. Fee*, 140 Ind. 372, 39 N.E. 93 (1894) (permission to use land without any provision for rent, at most, amounts to tenancy at sufferance).

²³In Indiana, an adverse possessor's conduct in using and occupying the land is sufficient to show the requisite intent to adversely claim the land, and it matters not whether the possessor actually intended only to occupy his own land or intended to occupy the land of another. This proposition was settled in the leading case of *Cooper v. Tarpley*, 112 Ind. App. 1, 41 N.E.2d 640 (1942), and was followed in the two recent boundary dispute cases of *Colley v. Carpenter*, 362 N.E.2d 163 (Ind. Ct. App. 1977), and *Penn Cent. Transp. Co. v. Martin*, 353 N.E.2d 474 (Ind. Ct. App. 1976). *Contra*, e.g., *Preble v. Maine Cent. R.R.*, 85 Me. 260, 27 A. 149 (1893) (one who intends to claim only his own land does not possess the hostile intent required for adverse possession).

In *Colley* and *Penn Central*, the courts also restated settled rules regarding the adverse possessor's payment of "all taxes falling due on the land" as required by IND. CODE § 32-1-2-1 (1976). In *Colley*, since no taxes were assessed on the disputed strip, no taxes were required to be paid. *See Langabaugh v. Johnson*, 321 N.E.2d 865 (Ind. Ct. App. 1975). In *Penn Central*, the adverse possessors' payment of taxes on improvements located on the land was sufficient to satisfy the statute.

In *Criss v. Johnson*, 348 N.E.2d 63 (Ind. Ct. App. 1976), the court of appeals discussed the effect of a legal survey made pursuant to IND. CODE § 17-3-63-3 (1976).

decision in *Piel v. Dewitt*,²⁴ discussing the kind of notice required to start the ten-year statute of limitations²⁵ running against a remainderman. In 1962, the life tenant executed a warranty deed to defendant Piel in which she purported to convey fee simple ownership to an eighty-acre tract of land. In fact, at the time of the conveyance, the life tenant owned only an undivided one-half interest in the tract and a life estate in the other undivided one-half interest. The warranty deed was recorded together with an "affidavit of transfer" in which the life tenant stated she was the owner of the entire tract. Piel took possession of the land immediately after the conveyance to him and remained in possession and paid taxes thereafter. The life tenant died in 1973, and immediately after her death the remaindermen sought a judicial declaration to their fee simple ownership of one-half the property. The trial court upheld the remaindermen's contentions, and Piel appealed, arguing that he had gained title to the entire eighty-acre tract by adverse possession.

The general rule is that the statute of limitations barring actions to recover possession does not run against a remainderman until the termination of the intervening life estate.²⁶ Death of the life tenant is the customary way of ending a life estate, but the life tenant may cause a premature termination by claiming a larger estate and properly notifying the remainderman, thereby repudiating the life estate.²⁷ The court of appeals rejected the view that constructive notice by recordation is sufficient to alert the remainderman of the life tenant's repudiation.²⁸ The court of appeals decided that the

The statute provides: "The lines, as . . . located and established [by the survey], shall be binding upon all landowners affected, their heirs and assigns, unless an appeal is taken as provided for by [§ 17-3-58-5]." *Id.* § 17-3-63-3(f). The court held that although the survey establishes the accuracy of the line surveyed, it does not establish or defeat title. Thus, after the time for appealing the legal survey, one asserting title by adverse possession to a line other than the surveyed line may bring a quiet title action.

²⁴351 N.E.2d 48 (Ind. Ct. App. 1976).

²⁵IND. CODE § 34-1-2-2 (1976) bars actions to recover possession of real estate 10 years after the cause of action to recover possession accrues.

²⁶Since the remainderman has no right to possession until the life estate ends, the remainderman's cause of action to recover possession cannot accrue until that time. *E.g.*, *Chambers v. Chambers*, 139 Ind. 111, 38 N.E. 334 (1894).

²⁷351 N.E.2d at 53 (citing 3 AM. JUR. 2d *Adverse Possession* § 226 (1962)). When the life estate is prematurely terminated by repudiation, the remainderman's right to possession is accelerated, and the statute of limitations may run against him.

²⁸Remaindermen are not required to constantly inspect recorded documents to preserve their interest. Recording acts protect subsequent purchasers from a common grantor and impart no notice to those whose interests are established prior to the recording. *See, e.g.*, *Lincoln Nat'l Bank & Trust Co. v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939). *But see Commonwealth v. Clark*, 119 Ky. 85, 83 S.W. 100 (Ky. Ct. App. 1904) (recording of life tenant's invalid deed claiming title to the fee simple held to constitute notice to the remainderman of the life tenant's adverse possession where the state was the remainderman).

adverse possessor must prove that the remainderman was given actual notice of the life tenant's repudiation.²⁹ Neither the recording of the life tenant's deed and affidavit nor *Piel*'s actual possession of the entire tract, which presumably is "in deference to the remainderman's future interest" until the "remainderman attains actual notice to the contrary,"³⁰ was adequate notice to the remainderman of an adverse claim during the lifetime of the tenant. What is adequate notice remains to be decided in a subsequent case.³¹

The *Piel* court also discussed the distinction between "when a right to partition exists and when the statute of limitations begins to run against the asserter of that right."³² A tenant in common or joint tenant, pursuant to Indiana Code section 32-4-5-1,³³ has the right to partition throughout the cotenancy; but the fifteen-year statute of limitations on the assertion of that right does not begin to run until there is an ouster of the asserter by his co-tenant.³⁴ The *Piel* court stated that the ouster rule "would seem logically to apply with equal force between a tenant in possession and a remainderman given the right . . . to bring an action for partition"³⁵ pursuant to Indiana Code section 32-4-6-1.³⁶ The *Piel* court was not required to

²⁹The court characterized this as the majority view. The court mentioned a closely related view that the adverse possessor must prove the remainderman's actual knowledge of the life tenant's repudiation. A review of the cases cited by the *Piel* court suggests that there is little, if any, real difference between the notice view and the knowledge view. *Compare Copenhauer v. Copenhauer*, 317 P.2d 756 (Okla. 1957), and *Quarles v. Aruther*, 33 Tenn. App. 291, 231 S.W.2d 589 (1950) (notice), with *Bretschneider v. Farmers' Nat'l Bank*, 131 Neb. 495, 268 N.W. 278 (1936), and *Maurer v. Reifschneider*, 132 N.W. 197 (Neb. 1911) (knowledge).

³⁰351 N.E.2d at 55.

³¹See Annot., 58 A.L.R.2d 291 (1958), for a compilation of cases addressing the question.

³²351 N.E.2d at 56.

³³IND. CODE § 32-4-5-1 (1976) provides:

Any person holding lands as joint tenant or tenant-in-common, whether in his own right or as executor or trustee, may compel partition thereof in the manner provided in this act. An administrator or executor may also compel partition as a tenant-in-common or joint tenant may do, whenever, in the discharge of his duties as such, it shall be necessary for him to sell the estate of the decedent therein. Trustees, administrators and executors may also be made defendants in actions for the partition of real estate to answer as to any interest they may have in the same.

³⁴E.g., *Hare v. Chisman*, 230 Ind. 333, 101 N.E.2d 268 (1951). A partition action may be barred by the running of the fifteen-year "catch-all" statute of limitations of IND. CODE § 34-1-2-3 (1976). See, e.g., *Nutter v. Hawkins*, 93 Ind. 260 (1884).

³⁵351 N.E.2d at 56.

³⁶IND. CODE § 32-4-6-1 (1976) provides:

When any person shall own an undivided interest in fee simple in any lands, and, at the same time, shall own a life estate in the remaining portion of any such lands, or any part thereof, then, in any such case, such person so

decide whether the life tenant's deed and affidavit in 1962 were sufficient "ouster" to start the statute running, because the partition action was brought within fifteen years of the deed and affidavit. Consequently, the determination of what is sufficient ouster to start the statute of limitations running in the life tenant-remainderman situation must await an appropriate case.

The fact that a life tenant or remainderman is given the statutory right to partition when one remainderman also owns a portion of the life estate led the Indiana Court of Appeals in *Hurwicz v. Zoss*³⁷ to the conclusion that possession or the right to immediate possession is required to maintain an action for partition under section 32-4-5-1. The court reasoned that if the legislature had intended to abrogate the common law possession requirement in its enactment of section 32-4-5-1, then the subsequent enactment of the life tenant-remainderman partition statute would have been meaningless and unnecessary.³⁸

C. Real Estate Contracts

In *McMahan Construction Co. v. Wegehoft Brothers, Inc.*,³⁹ the First District Court of Appeals affirmed the trial court's decree ordering specific performance of an option contract for the sale of real estate. The 1964 agreement was that Wegehoft would sell dirt and gravel from its land to McMahan on the condition that McMahan sell Wegehoft a neighboring parcel of property. The oral agreement was evidenced by a handwritten memorandum signed by representatives of both parties, which referred to Wegehoft's right to purchase McMahan's land as an option to purchase, exercisable before March 30, 1966. Although on several occasions between 1964 and 1968 Wegehoft inquired as to when it would receive a deed to the McMahan property, Wegehoft apparently did not realize that it held only an option to purchase and consequently did not give McMahan any specific notice of its intent to exercise the option. The facts recited by the appellate court indicate, however, that in 1967, after the option was required to be exercised, McMahan representatives believed that the Wegehofts "were going to purchase the property."⁴⁰

owning such fee and life estate, or the person or persons owning the fee in such lands subject to such undivided interest in fee and such life estate in any such lands, may compel partition thereof and have such fee simple interest in any such lands so held, set off and determined in the same manner as lands are now partitioned by law.

³⁷353 N.E.2d 549 (Ind. Ct. App. 1976).

³⁸351 N.E.2d at 56. The statutes are reprinted in notes 33 & 36 *supra*.

³⁹354 N.E.2d 278 (Ind. Ct. App. 1976).

⁴⁰*Id.* at 280.

The memorandum provided that McMahan would apply payments for dirt and gravel as a credit against the \$5000 purchase price of the land if Wegehoft so desired. Although McMahan removed dirt and gravel from 1964 until 1968, McMahan paid Wegehoft nothing until 1968, when McMahan tendered a check to Wegehoft for the value of the materials removed according to McMahan's records. Wegehoft refused to accept the check, tendered instead the difference between McMahan's check and the \$5000 purchase price, and demanded a deed to the property. When McMahan refused to convey, Wegehoft sued for specific performance of the contract of sale.

The court of appeals ruled that the trial court's decree of specific performance was supported by sufficient evidence to establish that an option contract had been created.⁴¹ The appellate court also decided that the written memorandum of the contract was sufficient to satisfy the statute of frauds.⁴² However, the court next had to deal with the fact that Wegehoft had not specifically indicated its intent to exercise the option. The general rule is that the optionee's election to exercise an option must be communicated to the optionor within the designated time, unless the optionor has prevented the optionee's timely exercise or has expressly or impliedly waived the time limit by his conduct.⁴³ Thus, the appellate court might have considered whether Wegehoft timely, albeit orally, indicated its intent to exercise the option, or whether McMahan, by its conduct, impliedly waived the time limit. Instead, however, the appellate court talked about the doctrine of part performance and affirmed the trial court's ruling that there was sufficient part performance to remove the "transaction" from within the operation of the statute of frauds. The court stated: "In the instant case we are concerned with partial performance being sufficient to exercise a written option contract."⁴⁴

⁴¹Various contentions, including no meeting of the minds and lack of specificity, were raised by McMahan and summarily disposed of by the appellate court.

⁴²The statute of frauds is codified at IND. CODE § 32-2-1-1 (1976). The *McMahan* court, following *Block v. Sherman*, 109 Ind. App. 330, 34 N.E.2d 951 (1941), applied the *RESTATEMENT OF CONTRACTS* § 207 (1932) to determine the sufficiency of the memorandum. It should be noted that § 207 has been changed by the drafters of the *RESTATEMENT (SECOND) OF CONTRACTS* (1972). The crucial difference between the two sections is that the Restatement (Second) requires that the memorandum state "with reasonable certainty the *essential terms and conditions of the unperformed promises* in the contract," while the original Restatement requires a statement of "the *terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made." (Emphasis added).

⁴³See, e.g., *Guyer v. Warren*, 175 Ill. 328, 51 N.E. 580 (1898); *Warren v. Cary-Glendon Coal Co.*, 313 Ky. 178, 230 S.W.2d 638 (1950); *O'Toole & Nedeau Co. v. Boelkins*, 254 Mich. 44, 235 N.W. 820 (1931).

⁴⁴354 N.E.2d at 282.

The appellate court's reliance on the part performance doctrine to resolve the issue of whether the option was exercised is misplaced. Part performance may remove an oral contract from within the operation of the statute of frauds.⁴⁵ In *McMahan*, however, the statute of frauds was satisfied by the written memorandum of the contract. The real issues that should have been put before and resolved by the trial and appellate courts were (1) whether the option could have been and was exercised in a timely manner, either orally or by Wegehoff's conduct,⁴⁶ and (2) if Wegehoff's exercise was not timely, whether *McMahan* impliedly or expressly waived the time for exercise of the option.

In *Blakely v. Currence*,⁴⁷ the Indiana Court of Appeals considered a provision in a real estate contract making purchasers' obligation to pay the purchase price "subject to loan approval." The court held that the clause required actual procurement of final loan approval as a condition precedent to purchasers' duty to perform the contract. The court did not address the question of whether purchasers made or were required to make a good faith effort to obtain final loan approval. The language used by the court suggests, however, that a purchaser is not required to make a good faith effort when the phrase "subject to loan approval" is used in the contract. If no good faith effort is required, however, then purchasers' promise to purchase the property would be an illusory promise and the contract would be a nullity.⁴⁸

D. Survivorship Rights

In *Anuszkiewicz v. Anuszkiewicz*,⁴⁹ a majority of the Third District Court of Appeals appeared willing to recognize the existence of a tenancy by the entireties relationship as to the proceeds of a sale of entireties real estate if, and so long as, the "marital partners so intend by appropriate action."⁵⁰ The *Anuszkiewicz* court

⁴⁵See, e.g., *Genda v. Hall*, 129 Ind. App. 643, 154 N.E.2d 527 (1959).

⁴⁶It has been held that oral acceptance is sufficient if the option does not require written acceptance. E.g., *Hunt v. Ziegler*, 350 Mich. 309, 86 N.W.2d 345 (1957). The *McMahan* court deemed it "unnecessary to confront the oral exercise issue" in light of its resolution of the part performance question. 354 N.E.2d at 282.

⁴⁷361 N.E.2d 921 (Ind. Ct. App. 1977) (in banc).

⁴⁸See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 70 (1970).

⁴⁹360 N.E.2d 230 (Ind. Ct. App. 1977). Judge Staton concurred with the result.

⁵⁰*Id.* at 233. The full text surrounding this quotation is as follows: "We therefore conclude that the proceeds from the sale of real estate held by the entireties only retain their *character of survivorship* when the marital partners so intend by appropriate action." (Emphasis added). Admittedly, retention of survivorship character is not the same as retention of entireties character. One spouse's interest in entireties property cannot be conveyed by one cotenant, nor can it be reached by the creditors of

found, however, that the marital partners did not so intend. Plaintiff's husband had deposited nearly one-half of the proceeds in a certificate of deposit in the joint names of himself and his son. After her husband's death, since these proceeds were still in existence and intact in another certificate of deposit,⁵¹ plaintiff asserted ownership in the proceeds as the surviving tenant by the entireties. The court of appeals affirmed the trial court's judgment denying the wife's claim. There was no showing of fraud, so the court of appeals presumed that the wife acquiesced in her husband's disposition of the proceeds. The husband, by his actions, and the wife, by her silent acquiescence, manifested an intent to destroy the survivorship feature of the entireties relationship.

Indiana's statutory provision regarding cotenancies between husband and wife in personalty has once again been amended, effective August 29, 1977, to provide:

one cotenant during the existence of the entireties relationship. Joint action is required. The survivorship feature of joint tenancy with right of survivorship is not so impregnable. One joint tenant may sever the survivorship relationship by conveyance, and a creditor of one joint tenant can compel severance. Although the *Anuszkiewicz* court's above-quoted holding, standing alone, does not make it clear that the court is recognizing an entireties relationship in the proceeds of a sale of entireties property, other portions of the opinion do clarify this point. First, the court based its decision that the marital partners no longer intended to hold the proceeds with right of survivorship upon a finding of acquiescence by the wife in their disposition. The joint tenancy survivorship feature can be destroyed by one of the cotenants acting alone, regardless of the consent or acquiescence of the other cotenant. Only the entireties survivorship aspect requires mutual assent to its destruction. Second, the court stated, "[A]fter the balance of the purchase price for the property was paid . . . , it was deposited by the [husband] before he died to a certificate of deposit in the joint names of [himself and his son]. Appellant's husband *thereby changed the character of the proceeds from entirety property to personalty held in joint tenancy.*" *Id.* at 233 (emphasis added). If the husband's action in disposing of the proceeds changed their character from entireties property, the proceeds must have retained their entireties character after they were received and until he acted to dispose of them.

The idea of holding proceeds from entireties real estate in an entireties relationship is not without support in Indiana cases. *See Whitlock v. Public Serv. Co.*, 239 Ind. 680, 688, 159 N.E.2d 280, 284-85 (1959) (dicta) (although normally there is no tenancy by entireties in personal property, proceeds from entireties land have the "characteristic of a tenancy by entireties . . . so long as the proceeds are intact and have not been divided or disbursed"). *See also Koehring v. Bowman*, 194 Ind. 433, 437, 142 N.E. 117, 118 (1924) (dicta) (tenancy by entireties does not exist in personal property except when property is "directly derived" from entireties land, such as crops or proceeds of sale); *Patton v. Rankin*, 68 Ind. 245 (1879) (crop raised on entireties land is held by entireties); *Mercer v. Coomler*, 32 Ind. App. 533, 69 N.E. 202 (1903) (applies *Patton* to judgments on entireties land).

⁵¹After his father's death and pursuant to his father's request, the son transferred the proceeds to another certificate of deposit in the joint names of himself and another.

Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in the possession of both husband and wife and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument⁵²

The italicized language was added by this most recent amendment. A simple, albeit improbable, example illustrates that the confusion caused by frequent amendment of this cotenancy statute may plague lawyers for years to come. Assume that *H* and *W* purchased several motor vehicles at various times during their marriage, all of which they still owned in October 1977, when *H* died. All the certificates of title merely name "*H* and *W*" as titleholders, with no indication of a right of survivorship. Cars purchased between 1949 and 1971 would be owned by *H* and *W* as tenants in common;⁵³ cars purchased between 1971 and January 1, 1976, would be owned by *H* and *W* as joint tenants with right of survivorship;⁵⁴ cars purchased between January 1, 1976, and January 1, 1977, presumably would also be owned as joint tenants with right of survivorship;⁵⁵ cars purchased between January 1, 1977, and August 28, 1977, would be owned as tenants in common;⁵⁶ and cars purchased after August 28, 1977,

⁵²IND. CODE § 32-4-1.5-15 (Supp. 1977) (emphasis added).

⁵³The then effective statute presumed, unless otherwise expressed in the instrument of title, tenancy in common to exist as to all personality, except obligations of the United States Government held in joint names. Ch. 145, § 1, 1949 Ind. Acts 383. This statute was effective until amended in 1971. Actually, the 1949 to 1971 period was preceded by two other periods in the history of cotenancies in personality. Before 1852, the common law favored joint tenancy with right of survivorship. Between 1852 and 1949, by statute, tenancy in common was presumed as to all personality unless otherwise expressed in the instrument of title. Ch. 9, § 4, 2 Ind. Rev. Stat. 245 (1852).

⁵⁴As to personality owned by husband and wife, the 1971 statutory language is identical to the language of the present version. Pub. L. No. 422, § 1, 1971 Ind. Acts 1969.

⁵⁵No statute was in effect during this period, so presumably the common law presumption of joint tenancy with right of survivorship prevailed. See Grimes, *Aunt Minnie's Portrait*, 10 IND. L. REV. 675, 685 (1977); Poland, *Trusts and Decedents' Estates*, 1975 Survey of Recent Developments in Indiana Law, 9 IND. L. REV. 371, 373 (1975).

⁵⁶The effective statute was the present version quoted in the text accompanying note 52 *supra*, minus the italicized language. Pub. L. No. 123, sec. 2, § 15, 1976 Ind. Acts 597, 605.

would be owned as joint tenants with right of survivorship under present statutory language. After *H*'s death, his executor must determine when the cars were acquired, because *H*'s interest in tenancy in common property is an asset of *H*'s estate, while survivorship property is not.⁵⁷

In *Hughes v. Hughes*,⁵⁸ the Indiana Court of Appeals held that those who own real estate as joint tenants with right of survivorship hold the right to the proceeds under a contract to sell the real estate as joint tenants with right of survivorship, unless they express a contrary intent. The joint tenancy relationship, once created, is not severed by a jointly executed contract, unless the contract manifests an intent to change the relationship.⁵⁹ Thus, when one of the joint tenant sellers died prior to the receipt of the entire proceeds under an installment land sales contract, the deceased seller's interest in the proceeds was extinguished in favor of the surviving joint tenants.

E. Easements

In *Brown v. Heidersbach*,⁶⁰ plaintiffs' predecessors in title, who were owners of several platted lots in Kopekanee Beach subdivision, had been granted rights to an easement to the shore of Lake George.⁶¹ Plaintiffs and their predecessors used this easement exclusively and constructed and used a pier attached to the easement for boat docking until 1973, when defendants subdivided other land, granted rights to use the easement to the other landowners, and removed plaintiffs' pier. Plaintiffs sought to enjoin defendants from

⁵⁷The assumption is that the amended statute has no retroactive effect and that ownership rights are determined by the law in effect at the time of the acquisition of the property. Any other assumption, it seems, would involve a statutory modification of property rights without due process of law.

⁵⁸360 N.E.2d 225 (Ind. Ct. App. 1977).

⁵⁹In *Hughes*, the contract expressly stated that the sellers were contracting "as joint tenants with right of survivorship and not as tenants in common." *Id.* at 227. However, the appellate court's statements, citations, and quotations make it clear that this contractual expression was unnecessary.

⁶⁰360 N.E.2d 614 (Ind. Ct. App. 1977).

⁶¹Plaintiffs Smith and Heidersbach joined in bringing an action against defendant Brown. Brown's predecessor in title had conveyed land to Heidersbach's predecessor in title in 1949 by a deed that contained the following clause: "Also, an easement to the shore of Lake George, over the east twenty (20) feet of lot Numbered 48 in the Original Plat of Kopekanee Beach, which easement is to be used in common with other lot owners." *Id.* at 616. Subsequently, in 1950, Brown's predecessor in title conveyed other land to Smith's predecessor in title by deed containing the following language: "Right of way to the lake is hereby given over a 20 foot easement located in Kopekanee Beach, First Addition." *Id.* The two granted easements were over the east 20 feet of lot 48, which was later conveyed to defendant Brown. *Id.*

expanding the number of persons entitled to use the easement and from removing any future piers. The trial court granted the injunction,⁶² but the Indiana Court of Appeals reversed.

In an opinion that extensively reviewed general principles of the law of easements, the court of appeals decided, for the first time in Indiana, that riparian rights are not rights incident to an easement allowing access to the shore of a lake. Riparian rights (to dock boats at an attached pier) "rest entirely upon the fact of title in the fee to the shore land";⁶³ and the fee owner, absent an express grant of his rights as a riparian owner, will not be held to have granted such rights incident to the grant of an access easement. Plaintiffs held only an access easement and therefore had no right to maintain a pier attached to the easement. The fact that defendants permitted plaintiffs to construct and use the pier did not support a finding that plaintiffs acquired prescriptive rights to use the pier.⁶⁴

The court of appeals also discussed plaintiffs' right to exclusively use the easement. Since no exclusive right was evidenced in the easement grants⁶⁵ and since defendants' action in granting others the right to use the easement did not "materially impair or unreasonably interfere" with plaintiffs' use of the easement,⁶⁶ the only way the judgment could be affirmed was for the court of appeals to find that exclusivity was acquired by prescription. However, plaintiffs' use of the easement, although exclusive in fact because no one else had used it, was not openly, notoriously, and adversely exclusive, so no exclusive rights were gained by prescription.

In *GTA v. Shell Oil Co.*,⁶⁷ Shell was granted a determinable easement for ingress and egress "[s]o long as the [leasehold] premises [were] used as an automobile service station."⁶⁸ Shell temporarily closed its service station,⁶⁹ and GTA argued that this terminated Shell's easement. The court of appeals upheld the trial court's determination that temporary nonuse of the premises, without an actual change of use, would not "constitute the intended limiting event."⁷⁰

⁶²The trial court also ordered defendants to replace the pier or pay damages. *Id.* at 617-18.

⁶³*Id.* at 619 (quoting *Thompson v. Enz*, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967)).

⁶⁴"So long as use is permissive, it cannot ripen into a prescriptive right. *Nowlin v. Whipple*, 120 Ind. 596, 22 N.E. 669 (1889).

⁶⁵See note 61 *supra*.

⁶⁶360 N.E.2d at 620. If no exclusive right is granted, the servient tenant "may make any use of the easement which would not materially impair or unreasonably interfere with the use of the easement by the dominant [tenant]." *Id.*

⁶⁷358 N.E.2d 750 (Ind. Ct. App. 1977).

⁶⁸*Id.* at 751.

⁶⁹*Id.* During the eighteen-month period that the service station was closed, Shell negotiated with potential sublessees for the construction of a fast-food restaurant on the leasehold premises. Representatives of the fast-food chain removed gasoline islands and pumps on one side of the service station and replaced them with the foundation for the restaurant. No sublease was signed, and no actual change in use occurred.

⁷⁰*Id.* at 753.

The court stated: "Before an easement will be terminated through nonuse, the requirement of uninterrupted use must be clearly stated and reasonably inferred from the intentions of the parties."⁷¹

F. Covenants

In *Howard D. Johnson Co. v. Parkside Development Co.*,⁷² the Indiana Court of Appeals discussed the recording of non-competition covenants. In 1965, Johnson, as lessee, and Parkside, as lessor, entered into a lease that contained a covenant prohibiting the establishment of a restaurant on any Parkside land within 1500 feet of the Johnson leasehold premises. In 1974, Parkside leased land adjoining the Johnson leasehold to Franchise Realty Corporation for the construction of a McDonald's restaurant. Johnson did not learn of the Franchise lease until after the start of construction of the McDonald's restaurant, which was within 275 feet of Johnson's building. When Parkside and Franchise failed to halt construction on Johnson's demand, Johnson obtained a temporary restraining order and a preliminary injunction. The trial court, however, denied Johnson's request for a permanent injunction and concluded that Johnson's remedy, if any, was at law against Parkside. The court of appeals affirmed.

In seeking to enjoin construction of the McDonald's restaurant, Johnson argued that when Franchise executed the lease with Parkside, Franchise had notice of the existence of the covenant and was bound by it,⁷³ based on Franchise's actual notice, by way of a title search, of a recorded memorandum of the Parkside-Johnson lease.⁷⁴ Johnson argued that Franchise was therefore bound to inquire as to the provisions of the unrecorded lease and was charged

⁷¹*Id.*

⁷²348 N.E.2d 656 (Ind. Ct. App. 1976).

⁷³The court of appeals assumed, without expressly deciding, that non-competition covenants are enforceable when the subsequent lessee of a common lessor has prior actual or implied knowledge or actual or constructive notice of the covenant. In a very early case, *Taylor v. Owen*, 2 Blackf. 301 (Ind. 1830), the Indiana Supreme Court held that non-competition covenants are personal and do not run with the land. The *Taylor* case has never been expressly overruled but apparently has little practical significance. See *Jos. Guidone's Food Palace, Inc. v. Palace Pharmacy, Inc.*, 252 Ind. 400, 248 N.E.2d 354 (1969). The modern view is that non-competition covenants in commercial leases are enforceable if positively expressed and are capable of running with the land. See *Pollack, Shopping Center Leases*, 9 KAN. L. REV. 379 (1961); *Reno, The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067 (1942).

⁷⁴The recorded memorandum of lease contained the following language:

That said lease itself contains the entire contract between the parties, including the amount of rent, times when rent shall be paid, and other provisions and covenants as regulated and govern the relationship of landlord and tenant between the parties; and all persons are hereby put on notice of the existence of such lease and are referred to the said lease itself for its terms and conditions.

348 N.E.2d at 658.

with constructive notice of those lease provisions. The court of appeals agreed that Franchise was charged with knowledge of all information contained in the recorded conveyances of Parkside.⁷⁵ However, the court concluded that Franchise's knowledge of the existence of the unrecorded Johnson-Parkside lease did not impose a duty on Franchise to pursue an inquiry concerning the provisions in that lease.⁷⁶ The recorded document was not within Franchise's chain of title; it did not describe any real estate other than the Johnson leasehold; and it did not specifically refer to the existence of a servitude on the adjoining property.⁷⁷

Lessees who want to be certain of the enforceability of non-competition covenants should carefully review the *Howard Johnson* opinion. Any recorded memorandum of the lease should be "calculated to inform"⁷⁸ title searchers of a restriction on adjoining property. The memorandum should include a legal description of the adjoining land and should specifically refer to the existence of a servitude on that land. If the memorandum of lease is properly drafted and recorded, then the lessee need not rely on his lessor's willingness to disclose the restriction to prospective lessees and purchasers of the restricted land.

G. Condemnation

Indiana courts were very active in the condemnation area during the survey period.⁷⁹ In two cases, the Indiana Court of Appeals

⁷⁵*Id.* at 660-61. A grantee is charged with notice of information contained in all prior conveyances by his grantor. *Hazlett v. Sinclair*, 76 Ind. 488 (1881).

⁷⁶348 N.E.2d at 661-62. It should be noted that Franchise actually asked Parkside if any restrictions existed on the Franchise lease. Parkside replied in the negative.

⁷⁷If the memorandum had been within the chain of title to the Franchise leasehold, Franchise would have had a duty to pursue any inquiry "reasonably suggested" by the document. *Id.* at 661.

⁷⁸Johnson also argued that the following circumstances imposed a duty upon Franchise to inquire about the existence of a non-competition covenant: (1) custom in the industry as to the use of such covenants, (2) Franchise's observance of the existing Howard Johnson restaurant on neighboring land, and (3) Parkside's development of the property according to a common plan or scheme. The court of appeals concluded that none of these factors, either separately or in combination, imparted notice of the covenant or imposed a duty to inquire further. Any alleged custom imposed a duty to do no more than Franchise had done when it searched title and made a general inquiry of Parkside. Knowledge of the existing Howard Johnson restaurant on adjoining land imposed no duty on Franchise. Johnson relied on two cases in support of this argument, but in both cases, unlike the present case, there was a condition or activity on the land that was about to be acquired by the subsequent purchaser, which imposed a duty on that purchaser to inquire. *Smith v. Schweigerer*, 129 Ind. 363, 28 N.E. 696 (1891) (recently erected mill); *Smith v. Mesel*, 119 Ind. App. 323, 84 N.E.2d 477 (1949) (recently drilled oil well). The covenant was not integral to any common plan or scheme of development so knowledge of the common plan or scheme imparted no notice or duty to inquire.

⁷⁹348 N.E.2d at 661.

⁷⁹Thirteen condemnation cases were decided. Cases not mentioned in the above textual discussion include: *Chambers v. Public Serv. Co.*, 355 N.E.2d 781 (Ind. 1976)

discussed factors that may properly be considered by the jury in determining the fair market value⁸⁰ of the condemned real estate. It is settled that the jury may properly consider not only the pre-existing use of the property, but also higher and better uses to which the condemned property might reasonably be adapted.⁸¹ The jury may also consider adaptable uses that can be made only in combination with other parcels not owned by the condemnee, "if the possibility of such combination is reasonably sufficient to affect the market value" of the condemned land.⁸² Thus, in *City of Indianapolis v. Heeter*,⁸³ the trial court correctly refused the city's tendered instruction, which would have told the jury that "artificially created" assemblage adaptability is "too remote and speculative to be considered in fixing valuation."⁸⁴

When the condemned land is a portion of a larger tract owned by the condemnee, the condemnor must compensate the condemnee not only for the fair market value of the portion appropriated, but also for damage to the residue owned by the condemnee.⁸⁵ In *State v. Church of the Nazarene*,⁸⁶ the court of appeals reviewed the

(discussing admissible evidence in light of a claim that the trial court abused its discretion in refusing to order PSC to answer interrogatories); *Rhoda v. Northern Ind. Pub. Serv. Co.*, 357 N.E.2d 287 (Ind. Ct. App. 1976) (no fraud by condemnor); *City of Gary v. Ruberto*, 354 N.E.2d 786 (Ind. Ct. App. 1976) (insufficient evidence to support claim of inverse condemnation); *State v. City of Terre Haute*, 352 N.E.2d 542 (Ind. Ct. App. 1976) (in spite of delays, the state is entitled to trial by jury); *Dubois Rural Elec. Coop. v. Civil City of Jasper*, 348 N.E.2d 663 (Ind. Ct. App. 1976) (discussing the sufficiency of the description of the condemned land and contractual waiver of the right to exercise the power of eminent domain).

⁸⁰Fair market value is "a determination of what the land may be sold for on the date of the taking if the owner were willing to sell." *Southern Ind. Gas & Elec. Co. v. Gerhardt*, 241 Ind. 389, 393, 172 N.E.2d 204, 205 (1961).

⁸¹E.g., *State v. Tibbles*, 234 Ind. 47, 123 N.E.2d 170 (1954). The jury may not, however, consider an intended specific future use. See *State v. City of Terre Haute*, 250 Ind. 613, 238 N.E.2d 459 (1968).

⁸²*City of Indianapolis v. Heeter*, 355 N.E.2d 429, 434 (Ind. Ct. App. 1976).

⁸³355 N.E.2d 429 (Ind. Ct. App. 1976).

⁸⁴*Id.* at 434. The city argued on appeal that the evidence was insufficient to show that a combination was a reasonable possibility. The court of appeals replied that it was the jury's function to determine the possibility of assemblage adaptability of the land. The *Heeter* court also reviewed the rule that it is within the discretion of the trial court whether to admit evidence as to the value of "comparable" properties. *Id.* at 436-37 (quoting *Beyer v. State*, 258 Ind. 227, 280 N.E.2d 604 (1972)). Furthermore, the court discussed the general rule that the condemnor's intended future use may not be considered in determining fair market value. 355 N.E.2d at 440 (quoting and distinguishing *State v. Sovich*, 253 Ind. 224, 252 N.E.2d 582 (1969)).

⁸⁵Severance damages may be awarded if there is unity of title, unity of use, and contiguity. See *State v. Heslar*, 257 Ind. 307, 274 N.E.2d 261 (1971). Severance damages are determined by computing the diminished value per acre of the residue tract. *Glendenning v. Stahley*, 173 Ind. 674, 682, 91 N.E. 234, 237 (1910).

⁸⁶354 N.E.2d 320 (Ind. Ct. App. 1976).

testimony of the condemnee's expert witness and computed the maximum fair market value and severance damages that could have been awarded based on that testimony. The jury's award, which was substantially higher than the maximum damages allowable by the court's computation, was reversed.⁸⁷

When a franchised utility serving a municipality condemns property used by another utility that serves areas annexed by the municipality, the condemnor is required to compensate the condemnee for property "owned by [the condemnee] within the annexed territory and used and useful by [the condemnee] in or in connection with the rendering of electric utility service therein."⁸⁸ In *Public Service Co. v. Morgan County Rural Electric Membership Corp.*,⁸⁹ the parties agreed that "used and useful" embraces not only "the value of the tangible, physical assets used by [the condemnee] in the condemned area," but also "the intangible loss represented by the 'going concern value' of those assets."⁹⁰ The parties, however, did not agree upon a satisfactory method of calculating "going concern value." The condemnee (REMC) used a "discounted net cash flow" method to arrive at a going concern value of \$33,645.33. The condemnor (PSC) arrived at a value of \$230 by taking an arbitrary ten percent of the appraised value of the condemned physical property. The court of appeals, in reversing the jury's award of \$36,522, disapproved of the "discounted net cash flow" method of computing going concern value. The "discounted net cash flow" method is objectionable because it uses a future period of reference and takes into account noncompensable damages for lost profits and speculative future development. Although the court did not adopt or approve of a specific method of calculating going concern value, the court ap-

⁸⁷The jury's award could be supported only by testimony which computed the condemnee's damages by subtracting the fair market value of the residue from the replacement cost of the entire tract. Apparently, the fair market value of the church property was computed by taking one-half of the replacement cost of the structures. The attempt to estimate damages by considering the full replacement cost of the structures was characterized by the court as an attempt to apply a substitution measure of damages. Substitution damages (the cost of purchasing an equivalent substitute for the property taken) cannot be recovered in an eminent domain proceeding. See *State v. Lincoln Memory Gardens, Inc.*, 242 Ind. 206, 177 N.E.2d 655 (1961). The *Nazarene* court reversed the jury award and ordered a remittitur.

⁸⁸IND. CODE § 8-1-13-19 (1976).

⁸⁹360 N.E.2d 1022 (Ind. Ct. App. 1977).

⁹⁰*Id.* at 1025. The court noted that going concern value has been at least impliedly recognized as a valuation factor in Indiana cases. See *Public Serv. Co. v. City of Lebanon*, 219 Ind. 62, 34 N.E.2d 20 (1941); *Hendricks County Rural Elec. Membership Corp. v. Public Serv. Co.*, 150 Ind. App. 503, 276 N.E.2d 852 (1971).

parently would have affirmed a valuation based on an arbitrary percentage of physical plant lost.⁹¹

A condemnee is not entitled to attorney's fees in an eminent domain proceeding.⁹² By statute in certain circumstances, a condemnee is entitled to interest on the damages award from the date the condemnor takes possession of the property.⁹³ The question of whether and how much interest should be allowed under the statute was the subject of two appeals during the survey period.⁹⁴

H. Horizontal Property Law

The Indiana Horizontal Property Act⁹⁵ was substantially amended during the survey period. Significant changes were made in provisions regarding insurance of common areas and facilities,⁹⁶ compulsory and permissible reconstruction of destroyed or damaged condominium units,⁹⁷ and methods of determining the co-owners'

⁹¹The court stated:

One way out of the dilemma of determining the "going concern value," which should be included within the "used and useful" concept, without reference to future factors, is to arbitrarily allocate to "going concern value" a percentage of physical plant. There is "a long line of authority accepting the percent method of calculating going concern value . . . ten percent . . . [being] the most prevalent figure"

360 N.E.2d at 1026 (quoting Kashman, *Going-Concern Value of a Public Utility in Condemnation by a Municipality*, 6 ARIZ. L. REV. 92, 99-100 (1964)).

⁹²In Divine v. State *ex rel.* Dep't of Natural Resources, 354 N.E.2d 245 (Ind. 1976), two Indiana Supreme Court justices, dissenting to the denial of transfer of a case in which attorneys' fees were disallowed, disagreed with this inflexible rule. The rule is set forth in State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973), and Harding v. State *ex rel.* Dep't of Natural Resources, 337 N.E.2d 149 (Ind. Ct. App. 1975).

⁹³IND. CODE § 32-11-1-8 (1976). When funds are deposited by the condemnor with the clerk of court and the condemnee withdraws or is able to withdraw the funds without posting bond, no interest is allowed.

⁹⁴State v. Reuter, 352 N.E.2d 806 (Ind. Ct. App. 1976); State v. Simley Corp., 351 N.E.2d 41 (Ind. Ct. App. 1976) (interest allowed on entire award because condemnee would have been required to post bond to withdraw funds).

⁹⁵IND. CODE §§ 32-1-6-1 to -31 (Supp. 1977). One of the amendments changed the title of the Act to the "Horizontal Property Law." *Id.* § 32-1-6-1. Also, throughout the text, other terminology was changed so that, for example, an "apartment" is now called a "condominium unit." *Id.* § 32-1-6-2. The rental connotations of the term "apartment" did not coincide with the concept of condominium ownership.

⁹⁶The co-owners' association must purchase a master policy affording fire and extended coverage for the full replacement value of the improvements "that in whole or in part comprise the common areas and facilities," and must also obtain a master liability policy. *Id.* § 32-1-6-18(a). Under prior law, purchase of insurance by the association was required only upon resolution of a majority of the co-owners. *Id.* § 32-1-6-18 (1976) (repealed 1977).

⁹⁷Improvements must be reconstructed unless there is "complete destruction of all the buildings containing condominium units." Two-thirds of the co-owners may decide to compel reconstruction even in the event of total destruction. *Id.* § 32-1-6-19

percentage interests.⁹⁸ New sections were added to provide for changes to the co-owners' percentage interests when the declarant-developer desires to add additional land to the condominium,⁹⁹ and to provide for withdrawal of committed land from the condominium.¹⁰⁰ Other amendments include a new section specifying what the declarant must do to reserve the right to maintain a sales office or model home in the condominium,¹⁰¹ and a new requirement that each deed of conveyance of a condominium unit include a statement of the amount of unpaid current or delinquent assessments of common expenses.¹⁰²

(Supp. 1977). *See also id.* § 32-1-6-20 regarding assessments to cover the cost of rebuilding when the property is not insured. Under prior law, reconstruction was not compulsory when more than two-thirds of a building was destroyed. *Id.* § 32-1-6-19.

⁹⁸The amended Act specifies that the co-owners may be assigned either equal percentage interests in the common property or percentage interests based on the size or the value of the unit in relation to the size or value of all units in the condominium. *Id.* § 32-1-6-7. Equal interests will be assigned if the declaration does not specify another method. Under prior law, declarants were free to establish any method of determining percentage interests, and the value method was assumed if the declaration did not provide otherwise. *Id.* § 32-1-6-7 (1976) (repealed 1977).

⁹⁹*Id.* §§ 32-1-6-2(d), -7, -12.1, -15.1, -15.2 (Supp. 1977). A developer may commit land to and build the condominium in phases by using the new expandable condominium approach. The declaration of expandable condominium must contain a general plan of development showing the maximum number of condominium units that may be added in subsequent phases, a schedule or formula for determining percentage interests in the common areas as each phase is added, and a time limit not to exceed 10 years within which the additional phases will be developed. *Id.* § 32-1-6-12.1. If the declaration conforms to these requirements, it is presumed that an owner of a condominium unit in the declared regime has consented to the changes in this percentage interest. *Id.* § 32-1-6-15.2.

¹⁰⁰A declarant may reserve an option to withdraw committed land from a condominium if the declaration contains an explicit reservation of the option to contract, a legally sufficient description of all withdrawable land, a statement as to whether portions may be withdrawn at different times, and a time limit not to exceed 10 years upon which the option to contract will expire. *Id.* §§ 32-1-6-2(m), -12.2.

¹⁰¹*Id.* § 32-2-6-15.6.

¹⁰²*Id.* § 32-1-6-14(a)(3). Within 5 days of any request, an officer of the co-owners' association must provide a statement of the amount of current and delinquent common expenses assessments to the owner, a prospective grantee, a title insurance company, or a mortgagee. *Id.* § 32-1-6-14(b).

XV. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

Indiana courts have written on a large number of issues involving secured transactions and creditors' rights in the last year, 1976-77. All are interesting, some deserving of great praise, and most have raised issues worthy of comment and discussion.¹ The United States Supreme Court has left a footprint on the rules governing some collection practices. Probably the most important decision is *Salem Bank & Trust Co. v. Whitcomb*,² which threatens to impose a hideous vicarious liability on public officers for the tortious acts of "fellow servants" after the state has shed its cloak of sovereign immunity. The case deserves careful re-examination.

A. Regulation of Financing Transactions

With respect to interest rates charged before the adoption of the Uniform Consumer Credit Code, the Indiana Court of Appeals continues to be "hoodwinked"³ by the deceptive nature of the so-called time price differential theory of usury laws. This time⁴ at least the rule was correctly applied by *Overbeck v. Sears, Roebuck & Co.*⁵ to a revolving charge account, thus allowing an unlimited finance charge imposed by a genuine seller. Consumers will be interested to know that justification for the principle was rationalized

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¹Probably the most imaginative opinion in the area of commercial law is Kruse, *Kruse & Miklosko v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976), discussed at notes 75, 92, & 104 *infra* and accompanying text. The worst opinion in the view of this writer is *Overbeck v. Sears, Roebuck & Co.*, 349 N.E.2d 286 (Ind. Ct. App. 1976), which could have upheld allegedly illegal finance charges on a more sensible ground.

²362 N.E.2d 1180 (Ind. Ct. App. 1977), discussed at note 70 *infra* and accompanying text.

³The author used the term in Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 227 (1973), and reaffirms the statement today with equal vigor. Proof of the deceptive nature of the "time price differential" theory will be found in the Federal Truth in Lending Law, which was drafted in part to require full disclosure to consumers of finance charges and to require their equation into the "annual percentage rate" as mathematically specified in that law. 15 U.S.C. § 1605 (1970).

⁴The court of appeals applied the doctrine in *Standard Oil Co. v. Williams*, 153 Ind. App. 489, 288 N.E.2d 170 (1972), to a lender as distinguished from a supplier of goods, services and land—a radical and serious departure from the then generally recognized parameters of the doctrine.

⁵349 N.E.2d 286 (Ind. Ct. App. 1976).

on the unsubstantiated⁶ ground that interest rates were too low, leaving consumers only the hope that some comparable judicial doctrine was reserved for redrafting statutory limits on finance charges when they are too high. Under present law, ceilings on rates charged by sellers of goods, services, and land in consumer and consumer-related transactions are regulated by the Uniform Consumer Credit Code based upon "cash price."⁷ Hopefully, the continued sympathy demonstrated by the Indiana courts for lenders and the "time price differential" will not foretell a bloody battle over the meaning of the term "cash price," which from the consumer point of view will be construed to mean a "fair cash price," and to bankers and sellers "any cash price the seller wishes to set at any time."⁸

B. Real Estate Transactions

1. *Recording Statutes.*—An instrument transferring or creating an interest in land may be recorded if in proper form, and when recorded will serve as constructive notice to those who claim through the same chain of title. Thus, if *M* (mortgagor) is the purported owner of Blackacre who executes a mortgage in favor of *E* (mortgagee), which is properly recorded, *E* will be protected against subsequent purchasers from or through *M*. For recordation to constitute notice, *M*, by name, must be properly described in the mortgage. The land included within the mortgage must also be described. If *M* is identified by an incorrect name, or if the land is misdescribed, later bona fide purchasers from *M* will defeat *E* if *E*

⁶Very substantial rates could be charged on various kinds of loans and sales under Indiana law prior to the Uniform Consumer Credit Code. A discussion of the limits on finance charges and the effect under truth in lending with respect to revolving credit will be found in Townsend, *Open End Credit under the Truth in Lending Law*, 3 IND. LEGAL F. 105 (1969). Attention is called therein to the various Indiana statutes and regulations allowing interest charges in excess of an annual percentage of 8%. *Id.* at 105 n.4. In its opinion, which recognized that pre-Code rates were too low, the court failed to consider the prices charged by the seller, Sears, Roebuck, and whether they contained a hidden charge for credit transactions. One thing is certain: thousands of consumers were taking bankruptcy at this time, but there was a total lack of proof that Sears was suffering. A refund of overcharges to creditors may or may not have been a healthy thing. The principle purpose of the Uniform Consumer Credit Code was to fix outer limits on credit, leaving the market place to establish finance charges by full competition among (1) lenders, (2) retailers, and (3) retailer-lenders.

⁷Finance charges are computed on the "amount financed." IND. CODE § 24-4.5-2-111 (1976). Computations are then applied to this amount on "revolving charge accounts," *id.* §§ 24-4.5-2-108, -207, and other credit sales. *Id.* § 24-4.5-2-201.

⁸"Cash price" is defined by the Indiana Code as the "price at which the goods, services, or interest in land are offered for sale by the seller to cash buyers in the ordinary course of business," and the price stated in required disclosure statements by the seller is "presumed" to be the cash price. IND. CODE § 24-4.5-2-110 (1976).

relies upon the record as constructive notice of his interests.⁹ The mortgage or instrument recorded only serves as constructive notice of some right or interest in land.¹⁰ Consequently, if the mortgage grants *E* a security interest in *M*'s tractor, recordation will not serve as constructive notice to third persons of the security interest in the vehicle.¹¹ These principles are illustrated in casebook style by *Howard D. Johnson Co. v. Parkside Development Corp.*,¹² where the owner of a shopping center leased land in the center to a restaurant operator. The lease provided that the lessor would not lease space within 1,500 feet of the premises described in the first lease to another for restaurant purposes. A memorandum of the lease was recorded naming the parties and describing only the leased property without the restrictive covenant. When the landlord subsequently leased other property within the 1,500-foot radius to another tenant for restaurant purposes, the first tenant sought to enjoin the second. The court held (1) that the restrictive covenant was a covenant that ran with the land¹³ and therefore was recordable and binding on purchasers of the land, but (2) that the recorded memorandum of lease did not include the restrictive covenant of the landlord or describe the servient land, and (3) since the second tenant had gone into possession and made improvements in good faith, he should prevail. He was not charged with a duty to examine records relating to other property or to take notice of the probability of restrictive covenants in other leases in the shopping center.

The case incidentally may raise the question of why a lease ever should be recorded. The landlord's title is perfected without recording,¹⁴ and the tenant's possession is sufficient to put third persons on

⁹Failure to properly name the mortgagor or grantor will make recordation ineffective against a bona fide purchaser (bfp) from the mortgagor by an instrument that uses his proper name—i.e., the name included in the instrument by which he acquired title. *Johnson v. Hess*, 126 Ind. 298, 25 N.E. 445 (1890). A deed or mortgage describing other land will not put a subsequent purchaser from the grantor on constructive notice. *See Rinehardt v. Reifers*, 158 Ind. 675, 64 N.E. 459 (1902).

¹⁰See *Starz v. Kirsch*, 78 Ind. App. 431, 136 N.E. 36 (1922) (holding that restrictive covenant not arising out of a grant does not run with land and is not recordable).

¹¹See also *Fowler v. Hawkins*, 17 Ind. 211 (1861) (lessor retained lien on crop); cf. *Foster v. Augustanna College & Theological Seminary*, 92 Okla. 96, 218 P. 335 (1923) (assignment of mortgagee's interest not constructive notice to subsequent bfp assignee of note secured by mortgage).

¹²348 N.E.2d 656 (Ind. Ct. App. 1976).

¹³On this point the court overruled some old Indiana law. *See Falender, Property, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 246 n. 73 (1977).

¹⁴The landlord's record ownership remains inviolate, and his title is perfected against all who purchase from or through the tenant. *See, e.g.*, *Wiseman v. Hutchinson*, 20 Ind. 40 (1863).

notice of his rights.¹⁶ The case then points to one of the main reasons for recording: to give notice of restrictions upon other property as in this case, which teaches that the restriction or reference to it along with a description of the other property must be recorded to be perfected as against later purchasers of the restricted premises.¹⁶ However, there may be several dangers in recording a lease. Recordation may create a cloud on title when the lease is prematurely terminated or abandoned. It should be observed that *Howard Johnson* involved recordation of a memorandum of lease as permitted by a recent Indiana statute¹⁷ whose main purpose was to permit recordation without publication of lengthy leases in the records. The statute requires the memorandum to include essential provisions, including (1) execution and acknowledgment by lessor and lessee, (2) their names, (3) a specific legal description of the premises, (4) the term of the lease, and (5) options to renew and extend. It permits, but does not require, the inclusion of (1) options of the lessee to purchase, (2) restrictions upon use of the leased premises or other described land of the lessor, and (3) other terms in the lease.¹⁸ Because options to extend or renew¹⁹ must be included and since options to purchase,²⁰ restrictive covenants, and other terms²¹ of the lease may be included, a legislative intent is reflected that these matters affecting the land should run with the land, as in the case of restrictive covenants.²² Purchasers from the landlord and

¹⁶E.g., *McClellan v. Beatty*, 115 Ind. App. 173, 53 N.E.2d 1013 (1944); *Willard v. Bringolf*, 103 Ind. App. 16, 5 N.E.2d 315 (1936).

¹⁷Thus, when an easement is reserved under the terms of a deed, the dominant estate should also be described. *E.g., Lennertz v. Yohn*, 118 Ind. App. 443, 79 N.E.2d 414 (1948). When a recorded lease imposes restrictions upon a tenant favorable to other premises, that property should also be described—at least to put subsequent assignees of the tenant on constructive notice of the extent of the restriction.

¹⁸IND. CODE § 17-3-49-1 (1976). The statute was adopted in 1967.

¹⁹*Id.* Descriptions of real estate are required to be a "specific legal description," except that a survey or plot plan may be used to describe parts of a building or larger tract adequately described.

²⁰An option to extend a lease has been held not to be a covenant that runs with the land in favor of the tenant's assignee. *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E.2d 199 (1952).

²¹Indiana case law has indicated that an option to purchase is not a covenant that runs with the land. *See Bandy v. Myers*, 141 Ind. App. 220, 227 N.E.2d 183 (1967). *But see Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1956). It has been held that an assignee of the tenant under a lease option is charged with the payment of rent so long as he occupies the land. *Hunter v. Smith*, 92 Ind. App. 609, 172 N.E. 926 (1930); *Baltes Land, Stone & Oil Co. v. Sutton*, 25 Ind. App. 695, 57 N.E. 974 (1900).

²²A provision in a lease for attorney's fees has been held not to run with the land. *Levin v. Munk*, 97 Ind. App. 118, 169 N.E. 82 (1929) (holding assignee of tenant liable for rent, which ran with the land, but not attorney's fees).

²³See notes 19-21 *supra* and accompanying text.

transferees of the tenant thus may be bound by these covenants which have not always been running with the land, at least if they are recorded. *Howard Johnson* did not deal with the problem arising when terms of the lease with respect to properly described property in the memorandum are omitted or incorrectly described. It seems logical that a purchaser from the landlord or tenant is charged with the duty of checking the original lease for the existence of terms that are not required to be included in the memorandum and, if omitted, matters required by the statute to be included. But a bona fide purchaser should be protected against errors in terms that are stated.²³ All purchasers would be wise, in a practical sense, to demand examination of the original lease and make thorough inquiry as to modifications²⁴ before they commit themselves—at least until these questions are settled by litigation or statutory revision.

Title lawyers should carefully study *Union State Bank v. Williams*,²⁵ which holds that a deed or conveyance in the chain of a purchaser's title reciting or showing an executory consideration creates a cloud upon the title. The vendor in such case holds a vendor's lien as security for the performance due, and the disclosure of this fact in the title papers through which the purchaser claims title puts him on inquiry to ascertain the status of that lien. The case also points up the need for filing lis pendens notice of litigation seeking to establish an unperfected interest in property, in this case a vendor's lien.²⁶ The lawyer who overlooks this security device may find himself on the wrong end of a malpractice suit.²⁷

Recording statutes never replace the requirement of actual knowledge or notice when required by some rule of law.²⁸ This prin-

²³By way of analogy consider the mortgage for \$500, which is erroneously recorded for \$200. Case law holds that a bona fide purchaser from the mortgagor may safely assume that the mortgage is for no more than \$200. The purchaser is not required to examine the original. *Osborn v. Hall*, 160 Ind. 153, 66 N.E. 457 (1903).

²⁴Purchasers in good faith relying upon recorded covenants or executory obligations, which run with or are charges upon the land, take subject to any parol, unrecorded modifications between the original parties. *Scott v. Stetler*, 128 Ind. 385, 27 N.E. 721 (1891); *Shuey v. Latta*, 90 Ind. 136 (1883) (extension of time by mortgagee effective against junior lien); *Graber v. Duncan*, 79 Ind. 565 (1881).

²⁵348 N.E.2d 683 (Ind. Ct. App. 1976).

²⁶Any lawyer conducting litigation to foreclose perfected liens or to establish claims in property may be wise to file lis pendens notice when litigation tolls the statute of limitations, which otherwise would bar the action. See IND. R. TR. P. 63.1.

²⁷In *Williams*, lis pendens notice of an action by the vendor to establish his unperfected lien was not filed. A later mortgagee with notice of the suit did not cut off the lien. The case is discussed at note 49 *infra* and accompanying text.

²⁸Thus, advances made under an optional open-end mortgage will take priority over an intervening title that has been recorded unless the advance is made with actual knowledge of the intervening claim. Recordation of the intervening claim is not sufficient. *Schmidt v. Zahrndt*, 148 Ind. 447, 47 N.E. 335 (1897).

ciple was applied to a life tenant who claimed title by adverse possession against the remainderman. In *Piel v. DeWitt*,²⁹ it was recognized that adverse possession cannot commence until the remainderman has actual notice of the adverse claim, and recordation of an affidavit that the life tenant claimed the whole was insufficient to meet this requirement of the law.

2. *Mortgages: Describing the Debt.*—Ordinarily a mortgage secures a debt, which as a practical matter should be described in the mortgage instrument.³⁰ But a mortgage is effective with a "basket" clause covering all existing and future debts of the mortgagor.³¹ It is clear that the mortgage may be effective without a debt at all, in which case it may serve as a charge in a transaction in which the mortgagor is given the option of paying or losing the property.³² A mortgage may secure a prior debt³³ or the debt of a third party,³⁴ and it may be effective as a gift when the obligation it purports to secure is not supported by consideration.³⁵ There is some indication that a mortgage may be effective although it does not refer to any kind of obligation, so long as parol evidence establishes the obligation or charge intended to be secured.³⁶ Parties to a mortgage may modify the obligation to the disadvantage of known junior lienholders.³⁷ If the debt secured is designated but misdescribed, it may be corrected by reformation,³⁸ but a bona fide purchaser from

²⁹351 N.E.2d 48 (Ind. Ct. App. 1976).

³⁰In consumer transactions, federal law demands that the amount of the debt must be disclosed in a disclosure statement. 12 C.F.R. § 226.8(c), (d) (1977) (amended March 23, 1977).

³¹See, e.g., *Sparrenberger v. National City Bank (In re Woodruff)*, 272 F.2d 696 (7th Cir. 1959); cf. *Hancock County Bank v. American Fletcher Nat'l Bank & Trust Co.*, 150 Ind. App. 513, 276 N.E.2d 580 (1972) (parol evidence established modification by parties of pledge agreement).

³²See *Kerfoot v. Kessner*, 227 Ind. 58, 84 N.E.2d 190 (1949).

³³See *Buck v. Axt*, 85 Ind. 512 (1882). A mortgage on land given to secure a prior debt is not taken for value. *Adams v. Vanderbeck*, 148 Ind. 92, 45 N.E. 645 (1896), *rehearing denied*, 148 Ind. 92, 47 N.E. 24 (1897).

³⁴See *Post v. Losey*, 111 Ind. 74, 12 N.E. 121 (1887); cf. *American Sav. & Loan Ass'n v. Hoosier State Bank*, 337 N.E.2d 486 (Ind. Ct. App. 1976) (savings account of owner given to secure debt of principal).

³⁵*Geothe v. Gemlin*, 256 Mich. 112, 239 N.W. 347 (1931) (parents made gift of note and mortgage to daughter—mortgage effective as charge on land for amount of note that was unenforceable). Even if the note is illegal, the mortgage may be enforced. *Paulausky v. Polish Roman Catholic Union*, 219 Ind. 441, 39 N.E.2d 440 (1942).

³⁶*Bach v. First Nat'l Bank*, 99 Ind. App. 590, 193 N.E. 696 (1935) (absolute deed intended as a mortgage secured not only original obligation but a new one later agreed to by the parties).

³⁷E.g., *Shuey v. Latta*, 90 Ind. 136 (1883).

³⁸*Leedy v. Nash*, 67 Ind. 311 (1879). See *Citizens' Nat'l Bank v. Judy*, 146 Ind. 322, 329, 43 N.E. 259, 265 (1896). Since the consideration for a unilateral instrument may always be proved, it seems that proof of the indebtedness secured does not violate the

the mortgagor is protected as against proof that the obligation was something greater.³⁹ A somewhat different version of the debt aspect of a mortgage was presented by *Pioneer Lumber & Supply Co. v. First-Merchants National Bank*,⁴⁰ where the mortgage recited that it was given to secure a \$20,000 note of even date executed by the mortgagors.⁴¹ In fact, the mortgagors did not execute a note at all, but pursuant to the financing arrangement, advances were made by the mortgagee to the mortgagors' contractor who ultimately executed a note to the bank for the amount recited in the mortgage. The advances were used to complete a home the contractor was building for the mortgagors. In effect, the court held that although the debt was misdescribed, the mortgage, in fact, secured the note of the contractor who had been paid with advances from the mortgagee with the mortgage becoming primarily charged for the indebtedness. Consequently, when a subcontractor attempted to impress a mechanic's lien upon the mortgagors' obligation owing to the contractor, the court held that the latter had been paid by way of setoff, and the notice of the lien came too late—an unusual transaction, but a good solution.

3. *Absolute Deed as a Mortgage*.—Older than the hills is the rule that if *M* deeds property to *E*, parol evidence is admissible to prove that the transaction was intended to secure a debt.⁴² In equity this creates a mortgage, and if the indebtedness is paid, *M* may force a reconveyance in equity.⁴³ So long as *M* remains in possession, *E* must foreclose his mortgage by judicial sale.⁴⁴ These principles were misapplied in *Moore v. Linville*,⁴⁵ where the mortgagee was

statute of frauds. IND. CODE § 32-2-1-2 (1976). *Hays v. Peck*, 107 Ind. 389, 8 N.E. 274 (1886). *But see Christian v. Highlands*, 32 Ind. App. 104, 69 N.E. 266 (1903). If the consideration is stated in grant or promissory form, parol evidence may be inadmissible. *See Annot.*, 84 A.L.R. 347 (1933).

³⁹*Osborn v. Hall*, 160 Ind. 153, 66 N.E. 457 (1903).

⁴⁰349 N.E.2d 219 (Ind. Ct. App. 1976).

⁴¹Note that the language in the mortgage was not promissory in character so as to integrate any prior or contemporaneous agreement. *See note 38 supra*.

⁴²*E.g., Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975), discussed in *Townsend, Secured Transactions and Creditors' Rights*, 1975 Survey of Recent Developments in Indiana Law, 9 IND. L. REV. 305, 310-12 (1975).

⁴³The remedy of the debtor is a bill to redeem. *Calahan v. Dunker*, 51 Ind. App. 436, 99 N.E. 1021 (1912). A strict tender is not required where the mortgagee or grantee is in possession. *Doyle v. Ringo*, 180 Ind. 348, 102 N.E. 18 (1913). The grantor may also seek an accounting or a declaration of rights upon disputed instruments without tender when the mortgagee is in possession. *Brown v. Follette*, 155 Ind. 316, 58 N.E. 197 (1900).

⁴⁴*Crumbaugh v. Smock*, 1 Blackf. 314 (Ind. 1824); *Barber v. Barber*, 117 Ind. App. 156, 70 N.E.2d 185 (1946); *White v. Redenbaugh*, 41 Ind. App. 580, 585, 82 N.E. 110, 112 (1907) ("Appellant must be considered as the mortgagee out of possession . . . and the same rules are applicable as if it had been a mortgage in the ordinary form.").

⁴⁵352 N.E.2d 846 (Ind. Ct. App. 1976).

allowed to enforce strict foreclosure by ejectment against the mortgagor in possession. This type of forfeiture was justified on the ground that *M* was asserting an equitable title without doing equity—i.e., tendering or paying the indebtedness. The court erroneously applied the shielding rules of equitable discretion as a sword,⁴⁶ and in this respect the decision was totally wrong. Had *E* been in possession of the property, the decision would have been supported by authority that would deny affirmative relief in equity to the mortgagee out of possession—i.e., to the extent that *M* was guilty of “unclean hands,” laches, or a failure to do equity.

4. *Vendor's Liens; Deeds in Consideration of Support; Equitable Liens.*—An unpaid vendor who conveys land is given an equitable vendor's lien on the property to secure the vendee's executory obligation.⁴⁷ The vendor's lien is a law-implied type of security originated at a time when a creditor could not levy execution upon the land, making the vendor's legal remedy inadequate and justifying the lien. Today, the lien may be defended upon the ground that only a congenital idiot would sell land on credit, and if he is not mentally incapacitated, equity in its mercy should provide him with the lien.⁴⁸ The lien again was recognized in *Union State Bank v. Williams*,⁴⁹ where the vendor conveyed land to the vendees who by the terms of the deed were to pay taxes, vendor's insurance, and heat bills, and by separate agreement promised to pay \$5,000. The vendees later executed a mortgage to a bank, and the question of priorities arose between the vendor, who claimed a vendor's lien for the unperformed obligations of the vendees, and the bank, who advanced funds to the vendees under a recorded mortgage. The court held that the vendor held a lien as security for the vendees' duty to pay taxes, insurance, and heat bills, and this lien was perfected in-

⁴⁶*Mott v. Fiske*, 155 Ind. 597, 58 N.E. 1053 (1900) (debtor in possession under equitable mortgage not bound by laches). The court erroneously applied *Ferguson v. Boyd*, 169 Ind. 537, 81 N.E. 71 (1907), which permitted strict foreclosure against a mortgagor who had long abandoned the premises. The *Ferguson* court determined that the mortgagor was barred by laches and an agreement surrendering his rights. None of these circumstances were present in *Moore*.

A court of equity very well could have refused to quiet title had the debtor sought affirmative relief. See *Cassell v. Lowry*, 164 Ind. 1, 72 N.E. 640 (1904). But cf. *Kerfoot v. Kessener*, 227 Ind. 58, 81, 84 N.E.2d 190, 200 (1949) (holding void a provision defeating the right of redemption). But cf. *Raub v. Lemon*, 61 Ind. App. 59, 108 N.E. 631 (1915) (after release of mortgagor's rights, mortgagee allowed to bring ejectment).

⁴⁷*Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975) (applying lien to conditional buyer of real estate who reconveyed it by informal transfer to conditional seller), discussed in *Townsend*, 1975 Survey, *supra* note 42, at 307-09.

⁴⁸A similar lien is not granted to a seller of goods who often sells on credit. *Johnson v. Jackson*, 152 Ind. App. 643, 284 N.E.2d 530 (1972).

⁴⁹348 N.E.2d 683 (Ind. Ct. App. 1976).

asmuch as this obligation appeared in the title through which the bank claimed its lien. The bank thus had constructive notice of the lien for what the court denominated "support."⁵⁰ With respect to the vendees' obligation to pay \$5,000, which did not appear in the deed, the vendor's lien was given priority as being first in time. The mortgagee would not be entitled to priority unless it was a bona fide purchaser. Since suit had been commenced to establish that the vendor's lien was pending at the time of the mortgage and since the bank had knowledge of the litigation, the court below correctly gave the vendor priority.⁵¹ The court pointed out an error on the part of the vendor's attorneys who initiated the suit to enforce the vendor's lien: failure to record lis pendens notice of the suit, which would have perfected the lien as against subsequent purchasers.⁵² No legal malpractice liability resulted because the bank had notice of facts that put it under a duty to make further inquiry, justifying a finding that it was not a bona fide purchaser. *Williams* is a thorough, well-written opinion.

*Paidle v. Hestad*⁵³ recognized another type of equitable lien arising in favor of a co-owner who makes improvements, pays taxes or joint liens upon the property, or makes other similar payments constituting expenditures in excess of his share. In seeking partition and contribution from his co-owners, equity provides him with a lien upon the interest of the others, which may be foreclosed in the same manner as other liens on realty. In this case, the lien survived administration of the estate of the defendant cotenant as against beneficiaries who were not bona fide purchasers.

5. *Conditional Sales Contracts.*—Conditional sales vendors continue to seek their pound of flesh by asserting forfeiture despite the Indiana Supreme Court rule favoring judicial foreclosure against a purchaser who has made substantial payments and who has not abandoned the premises.⁵⁴ In *Ogle v. Wright*,⁵⁵ a lower court decision

⁵⁰In recognizing the vendor's lien for support, the court overruled language in *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972), criticized in *Townsend, 1973 Survey, supra* note 3, at 229.

⁵¹The court applied the standard of reasonable care in determining notice or lack of good faith—i.e., knowledge that would put a reasonable and prudent man on inquiry is sufficient to put a purchaser on notice of the unperfected vendor's lien. In this case, knowledge of the lawsuit between vendor and vendee was sufficient to put the bank on notice.

⁵²See IND. CODE §§ 34-1-4-2, -8 (1976); *Wilson v. Burgett*, 131 Ind. 245, 27 N.E. 749 (1891).

⁵³348 N.E.2d 678 (Ind. Ct. App. 1976), discussed at note 203 *infra* and accompanying text.

⁵⁴The pioneer decision upon this proposition is *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), cert. denied, 415 U.S. 921, on mandate to enforce order, 263 Ind. 337, 330 N.E.2d 747 (1975).

⁵⁵360 N.E.2d 240 (Ind. Ct. App. 1977).

awarding forfeiture was reversed where the purchaser had agreed to erect a mobile home on other property of the vendor for which he was to be credited \$10,000 and required to pay the balance of \$8,500 in installments. After the purchaser had installed the mobile home with a defective sewer system (corrected by the vendor for \$2,800), and after the purchaser had continued to make his installment payments, the vendor gave notice of cancellation. The court determined that since the purchaser had made substantial performance, forfeiture was improper. The case was returned to the lower court for foreclosure, and the vendor was to be allowed damages for the defective sewer plus the balance due on the contract with interest.

In *Bartlett v. Wise*,⁵⁶ the defaulting sixty-eight-year-old conditional buyer, who had paid one-third of the principal over a ten-year period, vacated the premises because of a stroke and defaulted for nine months, during which time the property was damaged by fire and repaired by the purchaser. In a suit by the buyer for specific performance, the vendor successfully counterclaimed for cancellation and possession at the trial court level. The court of appeals reversed, finding forfeiture inequitable under the circumstances.

Forfeiture was denied in *Nelson v. Butcher*⁵⁷ because of waiver. There the conditional vendors obtained possession by posting bond at the threshold of an ejectment action initiated against vendees from whom the vendors had accepted chronically late and lagging payments.⁵⁸ The suit came twenty-one-days after notice to vacate. A decision of forfeiture was reversed upon the ground that the evidence established that late payments beyond the contractual grace period were accepted, and in accordance with established law, there was no proof that the vendors had given specific notice that they would no longer be indulgent unless the purchasers brought themselves current within a specified reasonable time. An anti-waiver clause in the contract was disregarded.⁵⁹ The court also held

⁵⁶348 N.E.2d 652 (Ind. Ct. App. 1976).

⁵⁷352 N.E.2d 106 (Ind. Ct. App. 1976).

⁵⁸The vendor brought ejectment under the old ejectment statute, which was noted as probably unconstitutional in *Smeekens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431 (1974).

⁵⁹The contract contained the clause: "Failure or delay of the Owner to exercise any option or remedy hereunder for any default . . . shall not operate as a waiver . . . to pursue such option or remedy for the same or any subsequent default at any time thereafter." Although not considered in this decision, the clause was interpreted as inapplicable to waivers of "earlier" defaults in *Pierce v. Yochum*, 330 N.E.2d 102, 112 (Ind. Ct. App. 1975), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 315 (1976). The court indicated that had late payments been received within the grace period of 60 days allowed by the contract, no waiver would have been indicated since such payments were made on time.

that the trial court should have allowed the purchasers damages on their counterclaim. The fact that they vacated the premises when the ejectment suit was initiated did not moot the case but was justified apparently as an anticipatory breach by the vendors.⁶⁰

That a conditional purchaser is the equitable owner of the property was recognized by *Fail v. LaPorte County Board of Zoning Appeals*,⁶¹ which allowed the purchaser to petition for a zoning variance. The purchaser was allowed to claim hardship even though he knew of the zoning restriction when he purchased. He succeeded to the rights of the vendor.

C. Security Interests in Personal Property

1. *Liability of Filing Officers and Employees.*—In connection with filings under Article 9 of the U.C.C., a filing officer or his employee may commit mistakes by improperly filing a financing statement⁶² or by erring in the search of the records upon a request for information.⁶³ In either case, a proper filing is effective when accepted, and the secured party is protected.⁶⁴ A person who then procures a record search that fails to disclose a validly filed financing statement will have a claim against the person who improperly filed the financing statement or the one who improperly conducted the search of the records, depending upon who made the error.⁶⁵ To

⁶⁰*Cf. Smeekens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431 (1974) (wrongful act of obtaining possession by the vendor was treated as an anticipatory repudiation or breach, justifying the purchaser in rescinding by later action).

⁶¹355 N.E.2d 455 (Ind. Ct. App. 1976). *Cf. Bowen v. Metropolitan Bd. of Zoning Appeals*, 317 N.E.2d 193 (Ind. Ct. App. 1974) (lessee, and not lessor, was the "owner" who could apply for zoning variance).

⁶²The filing officer who receives a filing is required to enter the filing in the appropriate index in a proper sequence and in accordance with rules adopted by the Secretary of State. INDIANA SECRETARY OF STATE, INDIANA RULES AND REGULATIONS FOR THE ADMINISTRATION OF THE UNIFORM COMMERCIAL CODE 32-40 (1972).

⁶³*Id.* at 46-65 (proper search procedures).

⁶⁴A financing statement is filed upon presentation for filing and tender of the filing fee or acceptance of the statement by the filing officer. IND. CODE § 26-1-9-403 (1976). Hence, third persons are bound by the filing even though improperly indexed. *McMillan v. First Nat'l Bank & Trust Co. (In re Fowler)*, 407 F. Supp. 799 (W.D. Okla. 1975).

⁶⁵Since the filing is effective upon tender with proper fees or acceptance, failure of the filing officer to properly place the filing in the records is the cause of loss to third party purchasers relying on the omission in the record. *See Reeder v. State ex rel. Harlan*, 98 Ind. 114 (1884) (recorder who failed to index recorded mortgage liable to purchaser who searched and relied upon records); *Mechanics Bldg. Ass'n v. Whitacre*, 92 Ind. 547 (1883) (release entered on wrong mortgage later certified as paid—recorder liable to person who relied upon certification).

If the filing officer is requested to make a search of the records and fails to uncover information sought, he is liable to the person making the request. *Compare Johnson v. Schloesser*, 146 Ind. 509, 45 N.E. 702 (1897) with *State ex rel. Lowry v.*

recover, it seems that he must prove fault, and in this he may be aided by presumptions. If there is a filing in an improper place or the filing is lost, a presumption may arise to the effect that the officer as of the time of filing was at fault, although the possibility that the omission or misfiling could have occurred under a later filing officer's regime may rebut the presumption.⁶⁶ If requested information is inaccurately taken from the records, fault upon the party providing the information is made apparent.⁶⁷ The person who claims injury must show that he reasonably relied upon the information furnished and the extent of his damages.⁶⁸ The foregoing estimate of responsibilities of those who file and furnish filing information has not clearly been determined by case law, but two matters have received attention. An insurance fund has been established by the state of Indiana to cover losses resulting from negligence of filing officers and their employees.⁶⁹

*Salem Bank & Trust Co. v. Whitcomb*⁷⁰ held that a filing officer, including the Secretary of State and the Director of the U.C.C. Division, could be held liable for negligence in filing or furnishing requested filing information.⁷¹ In a cloud of darkness and ambiguity, the opinion of

Davis, 96 Ind. 539 (1884) (both holding a recorder failing to record or improperly recording a conveyance liable to the person causing it to be recorded when his interest was defeated by a bona fide purchaser).

It is questionable whether he would be liable to a third person who relied upon information made to another who requested it. *See Mechanics Bldg. Ass'n v. Whitacre*, 92 Ind. 547 (1883) (indicating no liability unless recorder required by law to furnish information). Upon request the filing officer is required by law to furnish information. IND. CODE § 26-1-9-407(2) (1976). Hence, it can be argued that third persons should be permitted to rely upon it. *Id.* § 26-1-9-410.

⁶⁶*Cf. Keenan Hotel Co. v. Funk*, 93 Ind. App. 677, 177 N.E. 364 (1931) (when goods in possession of a bailee are lost or injured, there arises a presumption that the bailee is at fault). If a financing statement is filed while A is filing officer, and it is overlooked by A-2, who succeeds him, because it is not filed alphabetically or is missing, a plaintiff will have difficulty in establishing which officer was at fault. *Cf. Pittsburgh, C., C. & St. L. R.R. Co. v. Larosa*, 75 Ind. App. 475, 131 N.E. 22 (1921) (goods passing through two carriers—presumed last carrier at fault).

⁶⁷*See Reeder v. State ex rel. Harlan*, 98 Ind. 114 (1884).

⁶⁸*Cf. Continental Nat'l Bank v. Discount & Deposit State Bank*, 199 Ind. 290, 157 N.E. 433 (1927) (collecting bank liable only for loss resulting from negligence).

⁶⁹IND. CODE § 26-1-9-401(6) (1976) (primary source of payment of judgments against filing officers or their employees for failure to properly file or furnish correct information to be made from general fund not exceeding \$100,000 per fiscal year). This act was made retroactive in the sense that it applies to all judgments "recovered or to be recovered."

⁷⁰362 N.E.2d 1180 (Ind. Ct. App. 1977).

⁷¹The qualified privilege of public "officer" to wreak havoc with the citizenry as a result of his good faith dumbness, negligence, or wrongs committed in the performance of his "discretionary" duties was recognized but not applied. *Cf. Board of Comm'r's v. Briggs*, 337 N.E.2d 852 (Ind. Ct. App. 1975) (function of a filing officer or employee to furnish correct information was determined to be "ministerial").

the court of appeals indicated that vicarious liability of the Secretary of State and his Director would not extend to negligence of "officers" or to those who become servants of the public as distinguished from servants of the officer; however, liability would extend to negligence of "deputies."⁷² Because the court seemed to have some doubt as to the status of the Director and the status and identity of the employee responsible for omitting a filed financing statement from information furnished on request to the plaintiff, who allegedly advanced credit in reliance thereon, the court reversed the decision below, which granted summary judgment to the filing officers. The muddy water shed by this opinion as to the vicarious liability of a public "officer" for acts of his deputies and employees hopefully cries out for a re-examination of the whole doctrine in light of the generally accepted principle that the state and governmental units have become responsible for the acts of officers and employees. No public officer or employee today, without regard as to how he is characterized, has either a sufficient "deeper pocket" or control over those who work with, for, or under him—"fellow servants" in a broad sense—to justify the imposition of vicarious liability, unless of course either the particular wrongful acts of the "fellow servant" are directed by him, he participates therein, or he is guilty of fault in hiring or deploying those in his charge.⁷³ In short, it is absurd to hold the Governor, the Secretary of State, a judge, or anyone else in government service vicariously liable for "his" deputies or employees. It is a good guess that this is what the judge in *Whitcomb* wanted to say. He left the door open with a "muddy" opinion

⁷²362 N.E.2d at 1184. It has been a tradition to impose vicarious liability upon a sheriff for the wrongful acts of his deputies. *Magenheimer v. State ex rel. Dalton*, 120 Ind. App. 128, 90 N.E.2d 813 (1950).

⁷³Few decisions will be found imposing vicarious liability upon public officers for acts of their employees, except in the case of a sheriff. If liability was allowed, one ground for doing so was that the real employer, the state, was immune from liability. But sovereign immunity now has been repudiated in Indiana. *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972). If the officer is, in effect, a sub-agent between the state and "his" deputy or employee, under traditional rules of agency, he should not be held vicariously liable. *RESTATEMENT (SECOND) OF AGENCY* § 358 (1957).

As a condition to qualification for office and to establish the "deeper pocket," officers commonly are required to furnish bond or a surety, and the terms of the bond sometimes are conditional upon his responsibility for those who work for him. *See Halbert v. State ex rel. Board of Comm'r's*, 22 Ind. 125 (1864) (originating long-followed rule that treasurer and his bondsman were liable for losses of funds due to a burglary through no fault of the treasurer). The bond, of course, offers no protection to the officer, since he must reimburse his bondsman for losses paid. *See Fidelity & Cas. Co. v. McNamara*, 127 W. Va. 731, 36 S.E.2d 402 (1945). Few decisions will be found where reimbursement by the bondsman is sought against the vicariously liable officer.

on the issue,⁷⁴ and hopefully the doctrine of vicarious liability for public servants will disappear along with the privilege of the king's "officers" to blunder in the exercise of discretionary functions.

2. Creation and Perfection of Security Interests in Personal Property.—Two recent cases dealt with the status of a seller who has contracted to sell securities when he remains in possession of the securities (stock certificates). In *Kruse, Kruse & Miklosko v. Beedy*,⁷⁵ the seller's interest was characterized as a "security interest" securing the buyer's obligation to pay, thus subjecting the transaction to the remedies provisions of Article 9 of the U.C.C.⁷⁶ In this case, the stock certificates were turned over to an escrow agent to be retained until payment by the buyer, who was given voting rights and control over the assets of the corporation whose shares were involved.⁷⁷ In *Ralston Purina Co. v. Detwiler*,⁷⁸ the seller agreed to make delivery of the stock in blocks as the buyer paid the promised installments. The seller then assigned his contract rights to a lender, who perfected by filing with respect to the contract right and prevailed over the seller's creditor who subsequently pro-

⁷⁴On remand it seems the State of Indiana, the party primarily liable, should be named a defendant. *See IND. CODE § 26-1-9-401(6)* (1976).

The state is liable for the act of the state employee furnishing incorrect filing information. *See Hudleasco, Inc. v. State*, 396 N.Y.S.2d 1002 (Ct. Cl. 1977) (wrong held to be a "ministerial" duty for which state was liable if fault established).

⁷⁵353 N.E.2d 514 (Ind. Ct. App. 1976).

⁷⁶The court determined that the seller had exercised his right to rescind under U.C.C. § 9-505(2). This aspect of the case is discussed at note 92 *infra* and accompanying text.

⁷⁷By way of comparison, it is significant that a seller of goods in possession has rights in the nature of a security interest along with contractual remedies as provided in Article 2 of the U.C.C. *IND CODE § 26-1-2-703* (1976). His lien or right to keep or dispose of the goods is not subject to the Article 9 provisions applicable to security interests with respect to the requirement of a written security agreement, filing, and remedies on default. *Id. § 26-1-9-113*.

No similar provision will be found in Articles 3 or 8, dealing with sellers of negotiable instruments and securities. *Cf. id. § 26-1-8-107* (allowing seller to recover price in certain cases). Hence, the contract rights of sellers and buyers of securities and instruments are governed by common law principles and possibly provisions of Article 2, by analogy. *Cf. Stock Clearing Corp. v. Weis Sec., Inc. (In re Weis Sec.)*, 542 F.2d 840 (2d Cir. 1976) (court applied provision of Article 2 of Code to sale of securities).

In *Beedy*, had the court applied common law rules or Article 2 provisions, it would have been required to determine if the contract provision giving the seller the right to keep the stock and payments (\$70,000 of a total price of \$385,000) upon the buyer's default constituted a penalty. *Compare Melfi v. Griscer Indus., Inc.*, 141 Ind. App. 607, 231 N.E.2d 54 (1967) *with IND. CODE § 26-1-2-718* (1976). Since the transaction was denominated as creating a sale with a security interest in favor of the seller, this issue was eliminated.

⁷⁸364 N.E.2d 180 (Ind. Ct. App. 1977).

ceeded against the stock and the buyer. The court held, in effect, that although a security interest in securities and instruments cannot be perfected without possession,⁷⁹ a secured party's interest in the seller's rights under a contract to sell stock in his possession is perfected by filing—at least as against a subsequent lien creditor in certain cases. The case is discussed elsewhere from the standpoint of lien creditors.⁸⁰

3. *Remedies of Parties to Secured Transactions.*—One of the remedies of a secured party when the debtor defaults is to bring suit upon the debt.⁸¹ Suppose he does so but repossesses the collateral before or during suit. May the debtor require a reduction in the amount of recovery or a delay in enforcement of the judgment until the secured party exhausts his remedies against the collateral? *Roberts v. Watson*⁸² seemed to answer the question with a qualified "no" where a landlord with a security interest in the tenant's equipment obtained possession of the land and equipment during his suit to recover rent. In reversing the judgment below as erroneously allowing recovery for future rent and subtraction of the value of the collateral from the landlord's recovery for past due rent,⁸³ the court of appeals, on remand, allowed the landlord to propose to keep the goods in satisfaction of the indebtedness;⁸⁴ and if the proposal was rejected by the debtor, the court authorized a commercially reasonable sale⁸⁵ with the proceeds to be applied to the judgment. Alternately, the landlord could choose to have the rent judgment

⁷⁹The U.C.C. provides that a security interest in instruments (which includes negotiable instruments and securities) cannot be perfected by filing except as to proceeds in limited situations not applicable to this case. IND. CODE § 26-1-9-304(1) (1976). Except for the cases involving returned merchandise, the Code does not squarely deal with competing claims of third parties to goods or instruments in the possession of a debtor or contract rights arising when the debtor has contracted to sell the goods that remain in his possession. Compare *id.* § 26-1-9-306 (involving competing security interests in returned merchandise and proceeds thereof consisting of accounts and chattel paper) with *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261, 288 N.Y.S.2d 525 (Sup. Ct. 1968) (perfected security interest in proceeds from inventory and debtor's assignee of chattel paper arising from sale of goods that remained in debtor's possession).

⁸⁰See discussion at note 149 *infra* and accompanying text.

⁸¹IND. CODE § 26-1-9-501 (1976).

⁸²359 N.E.2d 615 (Ind. Ct. App. 1977).

⁸³The rent damages below, which included rent not yet due, were modified on appeal.

⁸⁴This remedy is permitted by IND. CODE § 26-1-9-505(2) (1976). This remedy is discussed at note 91 *infra* and accompanying text.

⁸⁵IND. CODE § 26-1-9-504 (1976) governs the requirement for sale or disposal of collateral by the secured party. Whether failure to comply with the Code wipes out the indebtedness or makes him liable in damages or both has not been resolved in Indiana. For a discussion of this problem, see *Townsend, 1976 Survey, supra* note 59, at 321-22.

entered and enforced by way of execution⁸⁶ or choose a new trial on the issue of damages.⁸⁷ The court seems to have said to the landlord: You may take the judgment for rent as determined on appeal and enforce it by execution or through your U.C.C. remedies against the repossessed collateral with accountability for the collateral or its disposal to be determined in future proceedings; or you may claim a new trial on the supposition that you may have either rightfully or wrongfully pursued Code remedies some time before judgment, which must be relitigated on the issue of damages upon retrial.⁸⁸ This indicates that if a secured party brings suit upon the debt alone, and prior thereto or during the course of the litigation the secured party injures or disposes of the collateral, the debtor may protect himself by compulsory or permissive counterclaim; and after judgment he may guard against loss by proceedings to prevent improper enforcement

⁸⁶If the secured party recovers judgment, he may levy upon the collateral if it has not been previously sold. He does not lose his lien by the levy. IND. CODE § 26-1-9-501(5) (1976). He also may levy on other property. The remand order in this case did not specify what assets of the tenant should be subject to levy.

⁸⁷The remand order seems to have indicated that if the landlord (secured party) elected to proceed against the collateral with his U.C.C. remedies, he could not enforce the judgment by way of execution until the Code remedies were exhausted. This would avoid the unseemly situation of the secured party selling collateral and moving against other assets by way of execution at the same time. The Code provides that the remedies are "cumulative," but not necessarily that they are concurrent. The order thus did no violence to the terms of the U.C.C.

⁸⁸Case law under the Code generally supports the right of the secured party to hold or repossess collateral while he sues on the debt. McCullough v. Mobiland, Inc., 139 Ga. App. 260, 228 S.E.2d 146 (1976) (pledgee allowed to recover on debt although he retained possession of collateral); Peoples Nat'l Bank v. Peterson, 7 Wash. App. 196, 498 P.2d 884 (1972), *aff'd*, 82 Wash. 822, 514 P.2d 159 (1973) (after repossession, secured party allowed to sue on debt and foreclose).

A large number of decisions, however, hold that when a secured party holds or regains possession of the collateral and fails to take affirmative action by an offer to rescind or a resale of the collateral, recovery upon the indebtedness may become improper upon a theory of (1) an election of remedies, (2) an election or offer to rescind accepted by the debtor, or (3) under the rule denying him a deficiency when a sale is not conducted in a commercially reasonable manner and as required by the Code. *Liberty Loan Corp. v. Wallace (In re Wilson)*, 390 F. Supp. 1121 (D. Kan. 1975) (having obtained an *in personam* judgment without asserting its security interest, secured party is precluded under principles of *res judicata* from bringing a subsequent action to enforce its security); *Moran v. Holman*, 13 U.C.C. REP. SERV. 206 (Alas. 1973) (after repossession, secured party sued on debt—recovery denied under evidence showing misuse of collateral or retention for excessive period of time); *Michigan Nat'l Bank v. Marston*, 29 Mich. App. 99, 185 N.W.2d 47 (1970) (indicating that if repossessing secured party failed to dispose of collateral properly within reasonable time, secured party could not recover on debt).

of the judgment.⁸⁹ In the latter case, Indiana allows him to raise the issue by motion.⁹⁰

Still another remedy of the secured party when the debtor has defaulted is to propose his intent to rescind in writing—i.e., to keep the collateral and payments received and give up any right to a deficiency. Collateral and prior payments may be kept in satisfaction of the obligation if notice is sent by a secured party in “possession” to the debtor who does not object in writing within thirty days.⁹¹ This provision of the U.C.C. was applied in *Kruse, Kruse & Miklosko v. Beedy*,⁹² where the seller of stock placed it in escrow with a provision in the contract that upon default by the buyer-debtor of his duty to make payments when due, the rights of the buyer should terminate and the seller “shall immediately be entitled to recover the same” and the buyer shall “upon any such default forfeit and surrender all right and claim to any and all payments.”⁹³ After the buyer had paid \$70,000 and then later defaulted, the seller sent him written notice to the effect that if the breaches continued for thirty days, the rights of the buyer to the stock should terminate with a “surrender” of all payments made.⁹⁴ This was held by the court of appeals to constitute a written proposal to rescind, and the seller was found to be a secured party in “possession” even though the stock certificates were held by an escrow agent.⁹⁵ Since the buyer did not reject the proposal within thirty days, the seller-secured party was allowed to regain the stock and keep the payments.

Leases of equipment are often used as financing devices, and frequently a transaction denominated as a lease in fact constitutes a sale to the lessee with a security interest in the lessor, thus subjecting him to the remedies and other provisions of the U.C.C.⁹⁶ In a case of

⁸⁹If the secured party has disposed of the collateral and is accountable for the proceeds, or if he is liable for improper disposition of, or injury to, the collateral at the time of the debtor's answer pleading, it seems that the debtor must file a counterclaim, or at least he must establish his rights during the course of litigation. See IND. R. TR. P. 13(A). See also IND. R. TR. P. 64(C).

⁹⁰*Id.*

⁹¹IND. CODE § 26-1-9-505 (1976). This provision does not apply where the collateral is consumer goods and the debtor has paid 60% or more of the cash price or loan.

⁹²353 N.E.2d 514 (Ind. Ct. App. 1976).

⁹³*Id.* at 518.

⁹⁴The buyer of the stock (debtor) took possession and control of the corporate property under the arrangement and through the fact that he had purchased the controlling interest.

⁹⁵Under U.C.C. § 9-305, a secured party is deemed to have possession of collateral in the possession of a bailee from the time of notification to the bailee of his interest. The escrow agent who held the stock certificates in this case was to deliver them upon fulfillment of the contract, and this was held to give the seller possession. *Accord, Barney v. Rigby Loan & Inv. Co. (In re Barney)*, 344 F. Supp. 694 (D. Idaho 1972).

⁹⁶If a lessee is given the option to become owner upon performing the lease or by paying a nominal sum in addition to the rent, decisions uniformly hold the transaction

first impression in Indiana, *Loudermilk v. Feld Truck Leasing*⁹⁷ determined, without discussion, that a truck lease did not create a security interest and allowed the lessor upon default of rent to recover and keep the leased property and all payments as provided in the agreement. Since the lease agreement also allowed the lessor to retake possession without terminating the lease, the court held that the reposessing lessor could recover rent after repossession so long as the equipment was held available to the lessee.⁹⁸ The court did not consider the obligation of the lessor to mitigate damages after repossession.⁹⁹

The final chapter in *Ertel v. Radio Corp. of America*¹⁰⁰ was written to the effect that an account debtor may set off his damages arising out of the account as against an assignee of the account.¹⁰¹

to be a sale with the seller retaining a security interest subject to the provisions of the U.C.C. *E.g.*, *Woco v. Benjamin Franklin Corp.*, 20 U.C.C. REP. SERV. 1015 (D.N.H. 1976). Parol proof of an option to purchase for a nominal or no additional consideration may be admissible to establish a security interest. *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ohio 1970). *But cf.* *Equitable Leasing Computer Syss. v. Clements (In re Financial Computer Syss., Inc.)*, 474 F.2d 1258 (9th Cir. 1973) (oral agreement within statute of frauds).

The importance of the commercial lease of goods or equipment is indicated by two current decisions involving taxation of the parties. *Compare Indiana Dep't of State Revenue v. Indianapolis Transit System*, 356 N.E.2d 1204 (Ind. Ct. App. 1976) *with Indiana Dep't of State Revenue v. Associated Beverage Co.*, 353 N.E.2d 544 (Ind. Ct. App. 1976).

⁹⁷358 N.E.2d 160 (Ind. Ct. App. 1976).

⁹⁸Equipment leases allowing a lessor to recover rent and keep the equipment upon breach by the lessee usually are held unenforceable as a penalty or as unconscionable. *E.g.*, *Arco Bag Co. v. Facings, Inc.*, 111 Ill. App. 2d 110, 151 N.E.2d 438 (1958); *cf.* *Fairfield Lease Corp. v. Umberto*, 7 U.C.C. REP. SERV. 1181 (Civ. Ct. N.Y. 1970) (lessor with right to accelerate and keep equipment). Provisions for liquidated damages will be upheld if reasonable. *See also Siletz Trucking Co. v. Alaska Int'l Trading Co.*, 467 F.2d 961 (9th Cir. 1972); *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 361 N.E.2d 1015, 393 N.Y.S.2d 365 (1977).

⁹⁹*Krieger & Shurn, Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 637-41 (1977), discusses the problem of mitigation when a landlord of real estate retakes the property and suggests that mitigation should be required.

¹⁰⁰354 N.E.2d 783 (Ind. Ct. App. 1976).

¹⁰¹The law to be applied in this case was resolved in *Ertel v. Radio Corp. of America*, 261 Ind. 573, 307 N.E.2d 471 (1974). On the latest appeal the court allowed the account debtor who received defective machines to set off damages measured by the cost involved in making repairs and the price paid for machines that were not reparable less their junk value.

Prior case law held that a debtor was not required to interpose a truth-in-lending claim as a setoff to an action upon the debt as a compulsory counterclaim. *Daughtrey v. First Bank & Trust Co.*, 435 F. Supp. 218 (N.D. Ind. 1977) (debtor who failed to set up violation in state court action by creditor allowed to recover penalty in later federal action). Prior law also permitted the creditor to offset its claim in an action by the debtor or to recover truth-in-lending penalties. *Binnick v. Avco Financial Services, Inc.*, 435 F. Supp. 359 (D. Neb. 1977) (setoff of claim discharged by debtor's bankruptcy where

While the Truth-in-Lending remedies for nondisclosure must be sought within one year from the time of violation, an Indiana decision held that a violation prosecuted under Indiana law may be interposed as a setoff against the creditor at any time by the debtor or his surety.¹⁰²

The risk of accidental loss or injury to collateral falls upon the debtor absent agreement otherwise.¹⁰³ This rule was applied against a buyer of stock certificates that were turned over to an escrow agent by the seller as security for the price when substantial assets of the corporation, whose stock was involved, were destroyed by fire.¹⁰⁴

Other current decisions recognize the right of a secured party to accelerate both the obligation and an event of default under an insecurity clause where the obligation is further secured by binding a surety without giving him an opportunity to cure the default.¹⁰⁵

D. Creditors' Rights

1. *Regulation of Collection Practices.*—Curbs on collection practices in the case of consumer credit have been imposed by the Fair Debt Collection Practices Act.¹⁰⁶ This new federal law is discussed elsewhere in this Survey.¹⁰⁷

2. *Mechanic's Liens.*—Rejection of the doctrine of sovereign immunity for tort by decisional law did not repeal the judge-made rule

debtor sought to recover penalty for truth-in-lending violation). *But cf.* *Newton v. Beneficial Fin. Co.*, 558 F.2d 731 (5th Cir. 1977) (setoff of claim discharged by debtor's bankruptcy denied in suit by debtor to recover truth-in-lending penalty).

¹⁰²*Holmes v. Rushville Prod. Credit Ass'n*, 355 N.E.2d 417 (Ind. Ct. App. 1976). The case applied IND. CODE § 24-4.5-5-205 (1976) of the Uniform Consumer Credit Code expressly allowing setoff of refunds and penalties allowed under the law. Indiana law otherwise limits recovery for violation of disclosure requirements to one year after the violations. *Id.* § 24-4.5-5-203(5) (1976).

Under the Federal Truth-in-Lending Law, the action to recover penalties and damages must be brought within one year of the violation, but setoff is not permitted until after the amount of the creditor's liability has been fixed by judgment. 15 U.S.C. § 1640(e),(h) (1970 & Supp. V 1975). The setoff provision was added October 28, 1974.

¹⁰³*Cf. IND. CODE § 26-1-9-207* (1976) (which applies where secured party in possession).

¹⁰⁴*Kruse, Kruse & Miklosko, Inc. v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976). This case is discussed at notes 1, 75 & 92 *supra* and accompanying text. However, when the transaction in *Beedy* was rescinded pursuant to U.C.C. § 9-505(2), the loss of assets was absorbed by the secured party who, nevertheless, got to keep payments made by the debtor.

¹⁰⁵*Holmes v. Rushville Prod. Credit Ass'n*, 353 N.E.2d 509, *remanded on other grounds on rehearing*, 355 N.E.2d 417 (Ind. Ct. App. 1976). The problem of acceleration under an insecurity clause (as when the lender deems himself insecure) was discussed in *Townsend, 1976 Survey, supra* note 59, at 318-20.

¹⁰⁶Pub. L. No. 95-109, 91 Stat. 874 (1977).

¹⁰⁷*See Bepke, Contracts, Commercial Law, and Consumer Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 100, 111-19 (1977).

to the effect that mechanic's liens cannot be obtained on real estate owned by the state or its subdivisions.¹⁰⁸ Another decision recognized the statutory lien allowed a subcontractor against funds owing to the prime by the owner contracting with him,¹⁰⁹ but denied the lien when notice to the owner was received after the owner's obligation had been discharged by a right of setoff against the prime.¹¹⁰

3. *Artisan's Liens.*—The lien of an artisan is lost if the work is done on credit terms allowing the owner to pay after the services are completed,¹¹¹ and also if the artisan refuses delivery after an excessive charge is demanded for release of the property.¹¹² Artisan's liens on several items of property usually are construed as general liens, prohibiting the owner of several lien items from claiming a part for paying for the services ascribed only to that part.¹¹³ These matters were involved in *Yoder Feed Service v. Allied Pullets, Inc.*,¹¹⁴ where the owner of chickens entrusted them to a grower who was to be paid on the basis of each chicken after they were picked up by the owner. However, the grower was required by oral agreement to buy feed for which no arrangement was made under the original written contract, and he refused delivery when the owner

¹⁰⁸Repp & Mundt, Inc. v. Hitzelberger Supply Co., 353 N.E.2d 547 (Ind. Ct. App. 1976). *But cf.* Middleton Motors, Inc. v. Indiana Dep't. of State Revenue, 366 N.E.2d 226 (Ind. Ct. App. 1977) (elimination of sovereign immunity terminated use of no estoppel against state). On public construction, subcontractors are protected by statutory provisions requiring the state or subdivision to require a surety whose liability is conditioned both upon performance and payment of subcontractors. *E.g.*, IND. CODE § 5-16-5-2 (1976). In certain cases, subcontractors may impress a lien upon funds owing by the government organization. *Id.* § 5-16-5-1.

¹⁰⁹IND. CODE § 32-8-3-9 (1976).

¹¹⁰Pioneer Lumber & Supply Co. v. First Merchants Nat'l Bank, 349 N.E.2d 219 (Ind. Ct. App. 1976) (setoff allowed to the extent of credit furnished the contractor by the owner through his mortgage executed in favor of a bank, which advanced the funds to the contractor). The case is discussed at note 40 *supra* and accompanying text. In *Pioneer Lumber*, the subcontractor lost his right to a lien on the land because he failed to notify the owner-intended occupant within 14 days after the work commenced, as required by law. IND. CODE § 32-8-3-1 (1976).

¹¹¹Newark Slip Contracting Co. v. New York Credit Men's Adjustment Bureau, 186 F.2d 152 (2d Cir. 1951). *See* Welker v. Appleman, 44 Ind. App. 699, 90 N.E. 35 (1909).

¹¹²Mockford v. Iles, 217 Ind. 137, 26 N.E.2d 42 (1940); IND. CODE §§ 26-1-7-209(4), 26-1-7-307(3) (1976). If the owner pays the artisan who is demanding excessive charges, he may recover his money on a theory of unjust enrichment for economic duress. *Lafayette & Indpls. R.R. v. Pattison*, 41 Ind. 312 (1872).

¹¹³*Cf.* Mockford v. Iles, 217 Ind. 137, 26 N.E.2d 42 (1940) (lien on goods for storage did not cover charges for moving); *Bierly v. Royse*, 25 Ind. App. 202, 57 N.E. 939 (1900) (lien of sawyer on lumber secured general account owing by owner). A lien may be specific. *Compare* provision of the U.C.C. applying to warehousemen's liens, IND. CODE § 26-1-7-209 (1976), *with* provision applying to carrier's liens, *id.* § 26-1-7-307.

¹¹⁴359 N.E.2d 602 (Ind. Ct. App. 1977).

tendered \$4,700 for the feed bill of \$4,956.22. The grower demanded that he be paid in full for the feed and the chickens. The court of appeals allowed the owner to recover in trover on the theory that the grower had no lien for feed since under the general contract, payment was not due the grower until twenty-one days after removal, and because the grower refused to make delivery until he was paid in full—a demand which was excessive.¹¹⁵ The duty of the grower to make partial delivery upon partial tender was not considered.

4. *Federal Tax Liens.*—Under the Federal Tax Lien Act,¹¹⁶ a security interest in the taxpayer's property may be defeated by a subsequent recorded tax lien if a "judgment lien" could take priority over the security interest under state law.¹¹⁷ In *Dragstrem v. Obermeyer*,¹¹⁸ the Seventh Circuit Court of Appeals dealt with this problem, and in the course of its opinion it reached the correct result but grossly misrepresented the status of Indiana law. The "kicker" in that case arose because the secured party held an unperfected security interest in the debtor's corn crop. The debtor-taxpayer sold the crop to a buyer who became his account debtor, and to protect his rights the secured party brought suit against the account debtor to impress his security interest upon the fund owing as proceeds of his security interest in the crop.¹¹⁹ Shortly thereafter, the United States was interpleaded and intervened in the action, and six days later it recorded notice of its tax lien. The question before the court was whether the secured party, who had filed suit against the account debtor, had such a perfected interest that it would be protected against a subsequent hypothetical "judgment lien" under local law.¹²⁰ The court noted that in Indiana a

¹¹⁵Subject to a setoff for the amounts owing to the grower, the owner was awarded damages measured by the value of the chickens at the time and place of delivery. Evidence of value in Ohio, where the chickens were to have been sold, was held improper.

¹¹⁶I.R.C. §§ 6321-6326.

¹¹⁷The Internal Revenue Code provides that the federal tax lien shall "not be valid as against any . . . holder of a security interest . . . until notice thereof . . . has been filed." I.R.C. § 6323(a). By definition a security interest comes into being only when (1) there is an obligation, (2) secured by contract, (3) the property is in existence, and (4) it has "become protected under local law against a subsequent judgment lien arising out of an unsecured obligation." I.R.C. § 6323(h)(1) (emphasis added). The Code further deals with certain super-priorities and special problems concerned with future obligations and after-acquired collateral not relevant here.

¹¹⁸549 F.2d 20 (7th Cir. 1977).

¹¹⁹Under U.C.C. § 9-306, the security interest in the corn crop continued in the account, which in this case was over \$30,000. *E.g., In re Mid State Wood Prods. Co.*, 323 F. Supp. 853 (N.D. Ill. 1971); *Fort Collins Prod. Credit Ass'n v. Carroll Dairy*, 553 P.2d 95 (Colo. App. 1976); *Matthews v. Arctic Tire, Inc.*, 7 U.C.C. REP. SERV. 369 (R.I. 1970).

¹²⁰The court held that the term "judgment lien" was used in a hypothetical sense so that even though under Indiana law (which is the case) an unperfected security in-

hypothetical judgment creditor could obtain an execution lien upon the obligation of the account debtor simply by causing execution to be delivered to the sheriff¹²¹ and for this reason the United States was given priority.¹²²

The statement as to Indiana law was wrong because a statute prohibits execution upon a chose in action unless the debtor surrenders it up.¹²³ However, the holder of a judgment could impress a lien upon the account debtor by initiating proceedings supplemental against the debtor and naming the account debtor as garnishee.¹²⁴ If this "judgment lien" would take priority over the secured party who had previously initiated judicial proceedings to establish his lien, the result reached was correct. However, Indiana has long recognized that a secured party or owner may perfect his rights to property in the possession of another by bringing suit to establish his in rem title and then filing lis pendens notice of the litigation.¹²⁵ Upon adoption

terest in personal property may be defeated by a subsequent judgment lien creditor without knowledge—the question of the government's knowledge is irrelevant. *Fred Kraus & Sons, Inc. v. United States*, 369 F. Supp. 1089 (N.D. Ind. 1974), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 261 (1974). The term was held to be co-extensive with "lien creditor" as defined in U.C.C. § 9-301.

¹²¹The Indiana statute allows an execution lien on personal property subject to execution as of the time the writ is delivered to the sheriff. IND. CODE § 34-1-34-9 (1976).

¹²²The court did not reach the following problem. Suppose that a federal tax lien arises, as it does, at the time of assessment. It is not recorded. Later the secured party acquires a security interest on the same property and perfects with knowledge of the tax lien, but before it is recorded. Who takes priority? Cf. *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938) (secured party with knowledge takes priority).

¹²³Unless "given up" by the judgment debtor no execution or execution lien can be asserted against choses in action. IND. CODE § 34-1-36-6 (1976) (emphasis added). No lien attaches, therefore, until "given up" by the judgment debtor. *Beckman Supply Co. v. Newell*, 68 Ind. App. 679, 118 N.E. 962 (1918); *Steele v. McCarty*, 130 Ind. 547, 30 N.E. 516 (1892). This same rule probably applies to personal property in the hands of a bailee or third party. E.g., *Moorman v. Quick*, 20 Ind. 67 (1863); *Williams v. Smith*, 7 Ind. 559 (1856). The rule is especially applicable when the personal assets are in the custody of a court as in this case. *Stout v. LaFollette*, 64 Ind. 365 (1878); *Winton v. State*, 4 Ind. 321 (1853).

If the debtor must surrender the chose in action in order for the property to become subject to execution or to an execution lien, upon surrender the lien procured becomes, in essence, a consensual security interest and probably is not a "judgment lien." See the comparable provision of § 60a(4) of the Bankruptcy Act, 11 U.S.C. § 96a(4) (1970) (lien by judicial proceedings defined as one arising in "ordinary course of such proceedings").

¹²⁴*Pouder v. Tate*, 132 Ind. 327, 30 N.E. 880 (1892); *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951).

¹²⁵Compare IND. CODE §§ 34-1-4-1 to -3 (1976) with *id.* §§ 34-1-4-8 to -9. The purpose of the statute providing for recordation of lis pendens litigation concerning property is to afford notice to subsequent purchasers and creditors. *Carr v. Stebbins*, 292 F. 747 (7th Cir. 1923).

of the new Indiana Rules of Civil Procedure, Trial Rule 63.1 expressly broadened the lis pendens rule to cover personal property and provided a means by which a secured party or owner could perfect his interest—i.e., by filing notice of his pending action against the property through the filing machinery of the U.C.C.¹²⁶ In this case, the secured party who sought to enforce his rights against the account debtor in proceeds of the corn crop apparently failed to file notice of lis pendens. Thus, under Article 9 of the U.C.C. it could be argued that the security interest remained unperfected against the tax lien until (1) judgment against the account debtor, (2) filing under Article 9, (3) filing of lis pendens notice of the suit, or (4) payment by the account debtor.¹²⁷ Since under Article 9 a hypothetical "lien creditor" would prevail, there is support for the decision.

5. *Tax Sales.*—Failure of a county auditor to comply with statutory procedures by omitting the address of transferees when the property was entered for taxation as real property and failure to give them notice of the proceeding are grounds for invalidating the tax sale. In *Long v. Anderson*,¹²⁸ the Seventh Circuit rejected

After default, a secured party with a security interest in accounts may enforce his rights by action against the account debtor. IND. CODE § 26-1-9-502 (1976).

¹²⁶IND. R. TR. P. 63.1(C) was adopted to take care of the unperfected secured party's problem in this case. By bringing suit to establish his unperfected security interest, he may perfect by filing lis pendens notice, using the filing machinery of the U.C.C. He may also perfect when possession of the property is taken by him or by a "court officer." Under the facts of this case, the account debtor ultimately paid some \$30,000 into court to be distributed as interests were determined by the ultimate judgment as between the secured party and the United States. Had the money been paid into court before the federal tax lien was recorded, the secured party would have prevailed under Trial Rule 63.1(C)—at least if it had been paid over before the United States had intervened.

Had the secured party filed lis pendens notice of his claim it is clear that he would have prevailed over a subsequent recorded tax lien. *Cf. First Nat'l Bank v. Hill*, 412 F. Supp. 422 (N.D. Ga. 1976) (bank from whom embezzler had stolen funds filed suit and lis pendens on assets of embezzler traced from thefts—bank prevailed over later recorded tax lien). In a state where no lis pendens notice is provided, it seems that in judicial proceedings by a secured party or owner to subject assets held by a taxpayer, constructive trust should prime their rights over a tax lien, if for no other reason than that the general rule of "first in time, first in right" should apply. *Dennis v. United States*, 372 F. Supp. 563 (E.D. Va. 1974).

¹²⁷Had the secured party or a third person obtained possession of the funds owing by the account debtor, his interest would have been perfected. IND. CODE § 26-1-9-305 (1976); IND. R. TR. P. 63.1(C). The secured party could have perfected by filing with respect to the account that was proceeds. Compare IND. CODE § 26-1-9-302(1) (1976) with *id.* § 26-1-9-306(3)(b). A secured party or owner who obtains judgment against a person holding funds of the taxpayer will prevail under the terms of the Internal Revenue Code protecting "judgment lien creditors" as against unrecorded tax liens. I.R.C. § 6323(a); *All-Temp, Inc. v. Williams*, 341 F. Supp. 872 (E.D. Mo. 1972). See *RESTATEMENT OF CONTRACTS* § 173(b)(ii) (1982).

¹²⁸536 F.2d 739 (7th Cir. 1976). The auditor in this case was aware that all tax notices and notices of the sale were not received, all of which indicated a flagrant

equitable considerations with respect to good faith compliance by the auditor, the public notice to all owners of tax assessments, and the ensuing consequences for failure to pay taxes on time.

6. *Exemptions*.—Two important changes in the state exemption laws were made by the 1977 General Assembly. Amounts of the general exemption law were raised to a total of \$6,000, with a limit of \$5,000 from realty, \$2,000 from tangible personal property, and \$100 from intangible property.¹²⁹ The former exemption from income and profits (\$15 plus ninety percent of amounts above that sum)¹³⁰ was deleted from this law, the effect of which will be to make the exemption provisions of the Uniform Consumer Credit Code¹³¹ controlling. Under the latter law, the debtor may now claim as exempt from weekly wages thirty times minimum wages plus seventy-five percent of amounts above that amount. The effect will be to eliminate the advantage allowed to the debtor under *Mims v. Commercial Credit Corp.*,¹³² which gave him the highest exemption of the two laws.

7. *Attachment and Garnishment—The "Dead Beat" Jurisdiction Case*.—If *D* (debtor), who resides in Washington, owes *C* (creditor) money arising from a transaction that occurred in New York, and if *D* owns a farm and a bank account located in Indiana, it long has been the traditional rule that *C* can obtain jurisdiction over *D* to the extent of his property in Indiana without personal service in Indiana by attaching the real estate and attaching and garnishing the Indiana bank in which *D* had the account.¹³³ Of course, *C* was required to give *D* adequate notice of the action,¹³⁴ and because of a United States Supreme Court decision just two years ago, a hearing upon

violation of due process and the ruling of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The decision, however, was based upon statutory non-compliance and Indiana law.

¹²⁹IND. CODE § 34-2-28-1 (Supp. 1977). Exemption is now limited to a "debtor domiciled" in the state and remains restricted to contract actions. *Id.* The real estate exemption may be limited to the personal or family residence. *Id.*

¹³⁰*Id.* § 34-2-28-1(d) (1976) (amended 1977).

¹³¹*Id.* § 24-4.5-5-105 (1976). Exemptions under this law are not limited to debtors domiciled in Indiana and to contract actions. It does not apply to support orders, alimony and attorney fee awards therein when specified in the awarding decree. For further discussion on this point, see notes 180-82 *infra* and accompanying text.

¹³²261 Ind. 591, 307 N.E.2d 867 (1974), discussed in *Townsend*, 1974 Survey, *supra* note 120, at 255-57.

¹³³This basis of jurisdiction was rooted in the two famous decisions of *Pennoyer v. Neff*, 95 U.S. 714 (1877), and *Harris v. Balk*, 198 U.S. 215 (1905). The doctrine of these cases was recognized as a basis for jurisdiction in Indiana. *Transcontinental Credit Corp. v. Simkin*, 150 Ind. App. 666, 277 N.E.2d 374 (1972).

¹³⁴Service by publication ordinarily was not adequate notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

the probability of recovery was to be promptly afforded *D*.¹³⁵ In *Shaffer v. Heitner*,¹³⁶ the same Court has knocked out this procedure as a violation of due process and will require *C* to first obtain a judgment in a state where *D* can be personally served or in a state with sufficient contacts to meet the requirements of *International Shoe Co. v. Washington*.¹³⁷ It seems that if the judgment is first obtained in such a state, it may be enforced by attachment or attachment and garnishment in Indiana. The effect of this decision is a serious impairment to legitimate creditors and a boon to "dead beat" debtors—especially when a liquidated type of claim is involved, and litigation over the merits is not a matter of serious concern.¹³⁸ Since the case does not eliminate attachment as a basis of jurisdiction, once a proper *in personam* judgment is obtained, its effect will be to decrease the options of the creditor and to increase the "dead beat's" opportunities for keeping his property away from the creditor. The Supreme Court decision seems to be based upon the supposition that litigation in the jurisdiction of dominant contacts, the debtor's residence or the place where he may be personally served, if fairer and less costly than in the state where the debtor is caching his property, a supposition that deserves more substantial proof than is demonstrated in the opinion. By placing emphasis upon the ephemeral contact theory of jurisdiction and by putting in jeopardy countless judgments and titles in property, the case recaptures the spirit of the common law procedure system.

The federal statute prohibiting "attachment, injunction or execution against" a federal banking association or its property before final judgment¹³⁹ was held inapplicable to a preliminary injunction brought by a mortgagor to prohibit the bank from conducting a private foreclosure sale in *Third National Bank v. Impac Ltd.*¹⁴⁰ This statute was construed by the United States Supreme Court as being aimed at prohibiting preferences to creditors, and therefore did not apply to a national bank's debtor seeking injunctive relief from im-

¹³⁵North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), discussed in Townsend, 1975 Survey, *supra* note 42, at 321.

¹³⁶97 S. Ct. 2569 (1977). For an in-depth discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 51-52 (1977).

¹³⁷326 U.S. 310 (1945). Indiana accepts the outer limits of jurisdiction based upon contacts under its long-arm rule. IND. R. TR. P. 4.4.

¹³⁸The case assumes that litigation upon the merits is the principal matter of concern when jurisdiction in *rem* is involved. This supposition is in error except where the plaintiff is enforcing a contingent type of claim. In other words, *in rem* jurisdiction serves a legitimate purpose—i.e., collection.

¹³⁹12 U.S.C. § 91 (1970).

¹⁴⁰97 S. Ct. 2307 (1977).

proper foreclosure. The Court approved a prior decision¹⁴¹ holding that a national bank may be made garnishee in an attachment proceeding involving litigation between third parties.

8. *Execution and Proceedings Supplemental.*—Suppose that a judgment creditor causes execution or process to be issued to a sheriff, but the debtor's property, subject to execution, attachment, or replevin is located in his house, garage, or business establishment. May the sheriff search the premises for assets?¹⁴² A recent decision of the United States Supreme Court, *G.M. Leasing Corp. v. United States*,¹⁴³ indicates that unauthorized entry into and search of a building in an effort to find assets of the debtor will subject the officer to liability for an unlawful search and seizure in violation of the fourth amendment. Although the case held that the search of a business office by Internal Revenue Service representatives in the enforcement of a jeopardy tax assessment violated the Constitutional prohibition against unlawful searches and seizures,¹⁴⁴ its rationale certainly is applicable to the conduct of the sheriff and public officers in quest of assets subject to execution, attachment, and replevin. Before entry into a private building, the decision indicates that the officer must act under a warrant. While no express statutory procedure is available to an Indiana judgment creditor for obtaining a search warrant for civil purposes,¹⁴⁵ it is clear that a court acting under its inherent equitable powers in proceedings supplemental, or other pending civil litigation, may issue an order authorizing a search after submission of affidavits or evidence showing probable cause that property subject to process is located within a building or enclosure within the protection of the fourth amendment.¹⁴⁶ The rule articulated in *G.M. Leasing Corp.* does not prohibit

¹⁴¹*Id.* at 2312 (citing with approval *Earle v. Pennsylvania*, 178 U.S. 449 (1900)).

¹⁴²It seems that the common law allowed seizure of goods in a business establishment, but not in a home. *Page Seed Co. v. City Hardware Store*, 96 N.H. 359, 77 A.2d 35 (1950).

¹⁴³429 U.S. 338 (1977).

¹⁴⁴In holding the fourth amendment rule against unlawful searches and seizures applied to corporate defendants as well as buildings used for business, the court found historical evidence that the Constitutional provision was adopted to protect against tax collectors. *Id.* at 355.

¹⁴⁵*Cf. IND. CODE § 35-1-6-1 (1976)* (allowing search warrant for "property the possession of which is unlawful"). The replevin statute allows the sheriff carrying out a writ of replevin to break into buildings. *Id.* § 34-1-9.1-10. It does not require the writ to be issued upon probable cause that the property subject to process is in the building, a requirement that seems to be inferred from *G.M. Leasing Corp.*

¹⁴⁶It should be noted that proceedings supplemental are available to reach assets of the debtor that he refuses to apply towards payment of the judgment. *IND. CODE § 34-1-44-2 (1976)*. After a hearing, the court may issue an order that the property be applied towards the judgment. *Id.* § 34-1-44-7. This should be sufficient authority to authorize a search for assets by the sheriff upon a finding by the court of probable

the executing officer from seizing goods and property on the public streets, parking lots, or other public places not involving the right of privacy. Surely it will apply to a search of safe deposit boxes and private enclosures in which case an appropriate court order based upon probable cause must be obtained.¹⁴⁷ Logically, the rule will also apply to a search for property that has been concealed on the person and may even prohibit seizure of wearing apparel without an appropriate court order based upon probable cause.¹⁴⁸

*Ralston Purina Co. v. Detwiler*¹⁴⁹ dealt with the interesting question of how a judgment creditor may reach the debtor's interest in corporate stock. Stock for which no certificate has been issued may be subjected to execution by levy upon the records of the corporation.¹⁵⁰ Under the U.C.C., no levy is effective with respect to issued stock until the certificate is seized, but equitable remedies are available to compel surrender or seizure.¹⁵¹ Until levy, however, the creditor obtains no execution lien upon the shareholder's interest according to *Detwiler*. The decision posed an interesting problem of priorities between a judgment creditor (for alimony) against stock owned by a debtor who had contracted to sell it in installments. As each installment purchase price was paid by the buyer, a proportionate amount of the stock was to be delivered. As security for a loan, the debtor then assigned his contract rights to a lender, who perfected by filing.¹⁵² The judgment creditor thereafter had caused execution to issue on her judgment, but no levy was made upon the stock or the certificates in the debtor's possession. During the time

cause. However, probable cause should be based upon facts, not information and belief. *Hamrick v. Ashland Fin. Co.*, 423 F. Supp. 1033 (S.D.W.Va. 1976).

¹⁴⁷*Cf. O'Connor v. McManus*, 71 N.D. 88, 299 N.W. 22 (1941) (safe deposit box opened after court order); *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925) (order issued authorizing sheriff to enter safe deposit box upon production in court of an affidavit showing that defendant owned lot).

¹⁴⁸*Cf. Mack v. Parks*, 74 Mass. (8 Gray) 517 (1858) (sheriff with writ of execution could not wrest jewelry being worn by defendant under common law limitations upon execution).

¹⁴⁹364 N.E.2d 180 (Ind. Ct. App. 1977).

¹⁵⁰Compare IND. CODE § 34-1-36-5 (1976) with *id.* § 26-1-8-317.

¹⁵¹*Id.* § 26-1-8-317.

¹⁵²The secured party conservatively filed in three places—with the Secretary of State, in the county of the debtor's residence, and in the county of the "location" of the corporation. It should be noted that a security interest in an instrument, including a security, cannot be perfected by filing but can be perfected by possession. IND. CODE § 26-1-9-304(1) (1976). It could be argued that a security interest in a contract right for the sale of an instrument or security likewise cannot be perfected by filing, but the court, in effect, held otherwise. The court recognized that an outright sale of a "contract right" by definition was a security interest for purposes of perfection. *Id.* § 26-1-9-102.

when the contract to sell the stock was executory in part and the judgment debtor apparently was in possession of the stock certificates, the judgment creditor finally sought to impress a lien upon the debtor's interests by means of proceedings supplemental to execution.

Detwiler held that the lender, who held a security interest in the contract to sell the stock certificates, took priority with respect to the stock and to the contract right to money owing to the debtor under his contract to sell the stock. In reaching this conclusion, the court failed to deal with the rights of the buyer under his contract to purchase the stock certificates in the judgment debtor's (seller's) possession, and the fact that the only practical means of perfecting a security or other interest, or a buyer's interest in securities and negotiable instruments, is by possession. The buyer had only a contract right to the stock certificate, probably enforceable by specific performance, thus creating an equitable title in him.¹⁵³ Although this equitable right was enforceable against the seller, the U.C.C. does not deal with priorities between nonpossessing buyers or persons claiming an equitable interest in instruments or securities and subsequent lien creditors of the seller-owner in possession.¹⁵⁴ Most of the current decisions under the Code dealing with equitable titles to goods hold that a good faith lien creditor will not cut off the rights of one holding an equitable title,¹⁵⁵ a result likely to be followed in Indiana.¹⁵⁶ Hence, assuming that the judgment creditor obtained a

¹⁵³Thus, if *S*, the owner and possessor of a share of stock in a close corporation, contracts to sell it to *P*, either party may enforce the contract by specific performance if the legal remedy is inadequate as in this case where it is difficult to prove damages. Compare IND. CODE § 26-1-8-107 (1976) with *id.* § 26-1-8-315(3). See *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1930) (court enjoined sale of stock contrary to agreement because the legal remedy was inadequate); Annot. 22 A.L.R. 1032 (1923). *P* does not hold a security interest in the stock absent a written security agreement or a transfer of possession.

¹⁵⁴Bona fide purchasers are protected as against adverse claims. IND. CODE § 26-1-8-301 (1976).

¹⁵⁵U.C.C. § 2-403 in effect describes the owner of an equitable interest as one with a right to avoid a "voidable title" and protects only a bona fide purchaser from the holder of a voidable title. IND. CODE § 26-1-2-403 (1976). A lien creditor is not protected, but in reaching this result, state common law outside the Code usually is applied. *E.g.*, *In re Federal's, Inc.*, 553 F.2d 509 (6th Cir. 1977) (one of the latest decisions discussing the problem).

¹⁵⁶Indiana common law decisions hold that a creditor obtaining a lien by judicial proceedings will not cut off an equitable title to goods. *Frontier Nat'l Bank v. Salinger*, 72 Ind. App. 479, 126 N.E. 40 (1920) (attaching creditors); *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 51 N.E. 105 (1898) (assignee for benefit of creditors). An equitable or other owner of a stock certificate who entrusts another with possession of the certificate fully endorsed or in the latter's name may be estopped to deny title against creditors who actually advance credit in reliance upon the appearance of ownership. *Conrad v. Olds*, 110 Ind. App. 208, 37 N.E.2d 297 (1941).

lien by initiating proceedings supplemental against the debtor (a point that is doubtful until a court order to turn it over has been carried out),¹⁶⁷ the buyer holding a title first in time would have been entitled to the stock as against the judgment creditor and non bona fide purchasers if and when he completed payments of the installments. That being the case, it can be argued that the only asset remaining with the judgment debtor with reference to the judgment creditor and third parties was a contract right, which the court correctly determined had been assigned to and perfected by the secured party before the judgment creditor obtained a lien or rights by proceedings supplemental. Under the Code, a prior perfected security interest will take priority over a subsequent lien creditor,¹⁶⁸ and this in effect is what the case finally held, even if the rationale was not quite complete. The question still remains a bit vague as to the rights of a prior equitable title in an instrument or goods as against a subsequent good faith lien creditor of the debtor, but the actual holding of this case seems to protect the prior equitable title.

In *State ex rel. Travelers Insurance Co. v. Madison Superior Court*,¹⁶⁹ the Indiana Supreme Court indicated that a garnishee in proceedings supplemental to execution must raise the issue of his nonliability by answer, thus allowing him a change of venue within ten days after answer.¹⁷⁰ This seems to run counter to the rule that further pleadings are not required,¹⁷¹ which would make the time for filing for an automatic change of venue run from the time the proceedings were initiated.¹⁷² The case may be limited to its peculiar

¹⁶⁷In proceedings supplemental, a judgment creditor who is seeking to have assets of the debtor applied to his claim or who is making a garnishee a party obtains a lien upon the property or obligation of the garnishee. With respect to the obligation or funds held by the garnishee, the lien becomes effective when the garnishee is served and has an opportunity to act. *Compare Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951) with IND. CODE § 26-1-4-303 (1976). Where as in this case the question of title to a negotiable instrument or security in the possession of the judgment debtor is involved, there is some doubt that a lien is obtained until the property is seized or surrendered. *Compare Neifeld v. Steinberg*, 438 F.2d 423 (3d Cir. 1971) (no lien by attachment until seizure) with *Knapp v. McFarland*, 457 F.2d 881 (2d Cir. 1972) (seizure prevented judgment debtor from challenging attachment; rule requiring seizure for protection of third parties); *Brown v. Fisher*, 35 Ind. App. 549, 74 N.E. 632 (1905) (obligor on negotiable instrument not subject to garnishment until protected against third parties).

¹⁶⁸The governing section of the Uniform Commercial Code is IND. CODE § 26-1-9-201 (1976), which the court failed to cite. Under that provision, a prior perfected security interest will take priority over subsequent purchasers and creditors.

¹⁶⁹354 N.E.2d 188 (Ind. 1976).

¹⁷⁰IND. R. TR. P. 76(2).

¹⁷¹*Id.* 69(E).

¹⁷²*Id.* 76(3).

facts, which arose because the "garnishee" was brought into the proceedings by a cross complaint filed by the judgment debtor.¹⁶³

9. *Enforcement of Equity Decrees: Alimony and Support*—Enforcement of support and alimony decrees payable in installments of specified amounts has been the subject of a series of recent opinions. It is now settled that alimony decrees (as distinguished from support orders) for a sum certain cannot be enforced by contempt even if the total is payable in installments. In *Shaunki v. Endsley*,¹⁶⁴ the Indiana Supreme Court applied the constitutional provision against imprisonment for "debt" in reaffirming this result.¹⁶⁵ On the same ground, the court of appeals in *Kuhn v. Kuhn*¹⁶⁶ disallowed contempt against a father who was delinquent in prior support payments after the children in whose favor the support was granted became emancipated. The court held that the obligation became a debt within the same constitutional provision.¹⁶⁷ On the other hand, *Strawser v. Strawser*,¹⁶⁸ inconsistently and erroneously held that the proceeding to enforce the decree after emancipation was not a debt for purposes of the statute of limitations.¹⁶⁹ Both of the foregoing

¹⁶³Because the court more or less out of hand overruled *Automobile Underwriters, Inc. v. Camp*, 217 Ind. 328, 28 N.E.2d 68 (1940), which involved the garnishment of an insurer (as was the case in *Travelers Ins. Co.*) by the judgment creditor, it seems that *Travelers Ins. Co.* applies to all garnishees raising objection to their liability. It is interesting to compare a line of cases holding that no change of venue of right is allowed in contempt proceedings seeking enforcement of an equitable decree. *E.g.*, *Linton v. Linton*, 336 N.E.2d 687 (Ind. Ct. App. 1975).

¹⁶⁴362 N.E.2d 153 (Ind. 1977).

¹⁶⁵IND. CONST. art. 1 § 22. This conclusion is not new. However, origin of the rule may stem from the broad rule of equity that will not grant extraordinary relief when legal or statutory remedies are adequate—*i.e.*, the remedies of execution and proceedings supplemental are adequate. *Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1904).

¹⁶⁶361 N.E.2d 919 (Ind. Ct. App. 1977).

¹⁶⁷The case followed *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952), which held that upon emancipation, the obligation for past due support becomes a debt within the meaning of the constitutional provision against imprisonment for debt.

¹⁶⁸364 N.E.2d 791 (Ind. Ct. App. 1977).

¹⁶⁹The case held that the action to procure the new judgment was an action for "injuries to personal property" and barred in two years. In this sense, the case is clearly wrong. Conceptually, the right to enforce overdue support payments has almost always been treated as the enforcement of a judgment or debt (for which the applicable statute of limitations is ten or six years). *E.g.*, *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952); *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971) (giving full faith and credit to support decree of Kentucky as a "debt," evidenced by the record). For historical reasons characterization of an equitable decree as a judgment or debt has been slow. *Compare Elliott v. Ray*, 2 Blackf. 31 (Ind. 1826) (chancery not a court of record for purposes of full faith and credit); *McCarthy v. McCarthy*, 308 N.E.2d 429 (Ind. Ct. App. 1974) (judgment of foreign alimony decree for overdue installments did not merge original decree for amounts not yet due); *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 99 N.E. 426 (1912) (recognizing bill to carry execution of equitable decree into execution) *with* *Hansford v. Van Auken*, 79 Ind. 302

decisions, along with *Owens v. Owens*,¹⁷⁰ contributed to the invention of another rule to the effect that a decree payable in installments cannot be enforced until a second judgment thereon establishes the amount due. Imposing a needless expense in time and effort upon the suffering spouse, this strange doctrine is neither supported by precedent nor common sense except in the rare case where the original decree providing for support fails to specify the amount payable.¹⁷¹ Finally, *Uhrich v. Uhrich*¹⁷² determined that an award of alimony for a fixed amount and a decree payable in installments was not a "judgment for the payment of money or costs" that became a lien upon the judgment debtor's real estate when properly docketed.¹⁷³ The case determined only that the judgment was not a lien for future installments, leaving open the question of whether or not the decree would constitute a lien for past due installments when docketed or becoming due after docketed.¹⁷⁴

(1881) (alimony decree for money is a "debt of record" upon which an action will lie to recover such "debt").

¹⁷⁰354 N.E.2d 350 (Ind. Ct. App. 1976).

¹⁷¹If the party against whom enforcement of an installment decree is sought claims that he has performed, he may assert his rights by motion. IND. R. TR. P. 13(M). *Strawser v. Strawser*, 364 N.E.2d 791 (Ind. Ct. App. 1977), discussed at note 168 *supra* and accompanying text, involved an action by the wife to recover support incurred before and after a prior divorce decree in which no support was awarded and after criminal probation ordering \$42 bi-weekly support to be paid to the wife for support of children. Since the duration of the probation was not stated, the obligation to pay support was so indefinite that a separate action was necessary for enforcement. *But see Matthews v. Wilson*, 31 Ind. App. 90, 67 N.E. 280 (1903) (court refused enforcement of a nonliquidated, general order to pay support as a judgment lien after 10 years—based in part on the theory of laches).

Failure to pay an installment decree for support has been held to be enforceable by contempt proceedings against the defaulting party. *Kerr v. Kerr*, 194 Ind. 140, 141 N.E. 305 (1923); *Perry v. Pernet*, 165 Ind. 67, 74 N.E. 609 (1905) (civil contempt for non-payment of support order not imprisonment for debt). However, before arrest or punishment, the defaulting party is entitled to notice and hearing upon the question of his default or misconduct. *Smith v. Indiana State Bd. of Health*, 158 Ind. App. 446, 303 N.E.2d 50 (1973) (14-hour notice of hearing inadequate); *cf. Denny v. State*, 203 Ind. 682, 182 N.E. 313 (1932) (no attachment of body until notice and hearing in contempt proceedings).

¹⁷²362 N.E.2d 1163 (Ind. Ct. App. 1977) (Staton, J., dissenting).

¹⁷³*Id.* at 1164. An unconditional judgment for the payment of money is a lien upon the debtor's realty in the county where properly docketed. IND. CODE §§ 34-1-45-2, 34-1-43-1 (1976). An equitable decree for the outright payment of money becomes a lien upon realty. *Martin v. Berry*, 159 Ind. 566, 64 N.E. 912 (1902) (deficiency judgment in lien foreclosure); *Rosenberg v. American Trust & Sav. Bank*, 86 Ind. App. 552, 156 N.E. 411 (1927) (alimony decree).

¹⁷⁴Prior case law holds that a decree providing for support payable in installments being subject to modification does not constitute a judgment lien for the future payments until a new judgment for past due installments is obtained and properly entered in the judgment docket. *Myler v. Myler*, 137 Ind. App. 605, 210 N.E.2d 446

Several prophylactic measures should be considered by a lawyer procuring a support or alimony decree payable in installments if it appears that enforcement will be a problem. The court awarding alimony or support may be asked to impress a lien upon the debtor's property to secure the payments.¹⁷⁵ There is no reason why this could not cover existing and after-acquired property.¹⁷⁶ The decree should provide for perfection in the appropriate records, and perfection should be carried out as authorized.¹⁷⁷ In the case of default of an alimony decree in a lump sum payable in installments, the decree might well provide for acceleration, a device which is impractical in the case of support payments. The problem may be illustrated as follows. Suppose a lien is created upon the husband's house to secure an alimony decree of \$10,000 payable in 100 monthly installments and to secure \$200 monthly support for the period of the infancy of two children. How will the lien be enforced when the judgment debtor is partially in default for two months? Will the whole property be sold to pay \$600? One vehicle would be to provide or allow acceleration if payments are not brought current before foreclosure, and this procedure is proper when the property cannot be sold in parcels.¹⁷⁸ Another would be to provide for foreclosure and sale of the whole collateral with surplus funds held in trust until the whole obligation is satisfied. The problem here may be one of the reasons for the holding that an installment judgment does not constitute a lien upon real estate.¹⁷⁹

(1965). Prior case law indicated or at least left open the possibility that a non-modifiable support order in designated installment amounts would support a judgment lien. *See Rosenberg v. American Trust & Sav. Bank*, 86 Ind. App. 552, 156 N.E. 411 (1927). The present Indiana Code provides for subsequent modification in certain situations. IND. CODE § 31-1-11.5-17 (1976) (orders for alimony or property settlement are not subject to modification except in the case of fraud).

¹⁷⁵IND. CODE § 31-1-11.5-15 (1976). *See Eppley v. Eppley*, 341 N.E.2d 212 (Ind. Ct. App. 1976) (applying prior law). For a case where the court awarding alimony enjoined the husband from transferring his interest in property, *see Boshonig v. Boshonig*, 152 Ind. App. 688, 285 N.E.2d 684 (1972).

¹⁷⁶While the court cannot base an alimony award upon future assets such as wages, it may provide for installment payments from future earnings. *Compare Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977) with *White v. White*, 338 N.E.2d 749 (Ind. Ct. App. 1975).

¹⁷⁷Decrees relating to land may be recorded in the lis pendens record and become perfected when recorded. IND. CODE § 34-2-27-1 (1976). Decrees establishing rights in personal property may be perfected by filing in the lis pendens file. IND. R. TR. P. 63.1(C), (D).

¹⁷⁸Upon foreclosure of a mortgage payable in installments without acceleration, statutes require the property to be sold in parcels. If this is not practicable the whole is to be sold with the proceeds applied to principal. If interest is not provided, the principal is reduced by a discount at legal interest rates. IND. CODE §§ 34-1-53-8 to -10 (1976). This procedure is applicable to all liens on real estate. IND. R. TR. P. 69(C).

¹⁷⁹The matter was briefly considered by Judge Staton in *Uhrich v. Uhrich*, 362

The court may order an assignment of the debtor's wages in proceedings to enforce an alimony or support decree under the provisions of a recent statute,¹⁸⁰ and no reason appears why this could not be done in the original decree. However, it now appears that the debtor-spouse is entitled to a weekly exemption from disposable earnings of thirty times minimum wages plus seventy-five percent of the excess unless the original or amending alimony decree, or the original or modifying support order, specifies a greater percentage.¹⁸¹ In the case of alimony, it is probable that no more than the lesser of the amount of weekly disposable earnings in excess of thirty times minimum wages or twenty-five percent of total weekly disposable earnings may be taken from wages, as provided under the Federal Truth-in-Lending Act.¹⁸² Enforcement of overdue sup-

N.E.2d 1163, 1165 (Ind. Ct. App. 1977) (Staton, J., dissenting), where he suggested that a claim for unmatured installments for alimony against a deceased husband could be allowed, discounted at present value, as provided in the Probate Code. IND. CODE § 29-1-14-3 (1976). In *Risk v. Thompson*, 237 Ind. 642, 147 N.E.2d 540 (1958), the court of equity refused specific performance against a vendee promising to pay money in installments. The court held that it would be improper to award a lump sum in damages by computing its present value. *But see White v. White*, 338 N.E.2d 749 (Ind. Ct. App. 1975).

¹⁸⁰IND. CODE § 31-1-11.5-13(e) (Supp. 1977).

¹⁸¹*Id.* § 24-4.5-5-105 (1976) also provides that the exemption shall not apply to any order of any court for the support of any person. Nor shall this provision apply to decrees awarding alimony or attorney's fees therein when the decree awarding such support, alimony, or attorney's fees specifies the amount or percentage of the disposable earnings to be applied thereon.

Prior law allowed a debtor the greater exemption between the general exemption law, IND. CODE § 34-2-28-1 (1976) (amended 1977), and the provision of the Uniform Consumer Credit Code, *id.* § 24-4.5-5-105 (1976), allowing an exemption from weekly disposable earnings of 30 times minimum wages plus 75% of amounts in excess thereof. *Mims v. Commercial Credit Corp.*, 261 Ind. 591, 307 N.E.2d 867 (1974). The provision of the general exemption law allowing an exemption from weekly income of \$15 plus 90% of excess was repealed by deletion, effective October 1, 1977. IND. CODE § 34-2-28-1 (Supp. 1977). *See* discussion at notes 129-32 *supra* and accompanying text.

Under prior law, it was clear that enforcement of an alimony decree was subject to applicable exemption provisions (at least if the original decree did not specify otherwise). *Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945). This case applied IND. CODE § 34-1-44-7 (1976), limiting garnishment in proceedings supplemental to 10% of income. Case law has not determined whether this limitation will apply to restrict the amounts subject to garnishment as allowed by *id.* § 24-4.5-5-105. Prior decisions indicating or holding that the general exemption statutes applicable only to contract actions did not apply to support orders or alimony are irrelevant since neither statute is confined to contract actions. *Cf. Menzie v. Anderson*, 65 Ind. 239 (1879) (alimony judgment not founded upon contract for purposes of general exemption statute).

¹⁸²This exemption does not apply in the case of "any order for the support of any person." 15 U.S.C. § 1673(b) (1970). Note that no exception is made for alimony, which under Indiana law is based primarily on property distribution, not support.

port and alimony installments otherwise may be pursued by execution and proceedings supplemental along with other remedies available to judgment creditors,¹⁸³ and hopefully the rule requiring a new judgment as a condition to enforcement will be dropped by the same magic that brought it into being.

10. *Bankruptcy*.—Several bankruptcy decisions originating in Indiana deserve mention. Actions in state court to recover damages against a trustee, his attorney, and other persons connected with a bankruptcy case were enjoined by the bankruptcy court on the theory that the issues had been litigated in the bankruptcy proceedings and were precluded by judgment.¹⁸⁴ The power to enjoin state court proceedings to protect the finality of a bankruptcy determination was recognized and applied in a case where the parties injured by the state proceedings should also have claimed damages as well.¹⁸⁵

In re Alliance Beverage Co.,¹⁸⁶ recognized the rule that payment to a creditor within four months of bankruptcy constitutes a preference to a surety with knowledge (in this case corporate officers). The case determined that the bankruptcy court lacked summary jurisdiction to avoid the preference.

11. *Receiverships*.—A receivership is a severe, extraordinary remedy and is not granted without proof of substantial need. Toward this end, Indiana law was fairly well settled that an owner seeking ejectment could not get a receiver appointed. Since he could get immediate relief after posting bond and requesting a hearing, or obtaining the protection of a counter-bond from the defendant,¹⁸⁷ his legal remedy was adequate.¹⁸⁸ This rule was ignored in *United*

¹⁸³ Cf. *Ralston Purina Co. v. Detwiler*, 364 N.E.2d 180 (Ind. Ct. App. 1977) (alimony decree enforceable against debtor's common stock).

¹⁸⁴ *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976).

¹⁸⁵ A good case for malicious prosecution against the person initiating the state action is indicated by the facts of *Woodmar Realty*, *id.* Compare *Snider v. Lewis*, 150 Ind. App. 30, 276 N.E.2d 160 (1971) (recovery for a malicious prosecution of civil case in federal court was allowed in a state action) with *Gore v. Gorman's, Inc.*, 143 F. Supp. 9 (W.D. Mo. 1956) (malicious civil prosecution against creditor suing on claim discharged in bankruptcy).

¹⁸⁶ 420 F. Supp. 437 (N.D. Ind. 1976).

¹⁸⁷ In ejectment, the plaintiff may obtain possession by posting bond and establishing a probability of recovery unless a counter-bond is posted by the defendant. IND. CODE §§ 32-6-1.5-1 to -12 (1976).

¹⁸⁸ *Meacham v. Sanders*, 233 Ind. 182, 118 N.E.2d 126 (1954). *But see Bitting v. Ten Eyck*, 85 Ind. 357 (1882). Injunctive relief to regain possession is also usually denied when the plaintiff has the remedy of ejectment and is pursuing it. *Detamore v. Roberts*, 223 Ind. 12, 57 N.E.2d 585 (1944); *Heugel v. Townsley*, 213 Ind. 339, 12 N.E.2d 761 (1938).

States Aircraft Financing, Inc. v. Jankovich,¹⁸⁸ where the lessor of a municipal airport intervened in an ejectment action in which the lessee had procured possession pendente lite by posting bond from its assignee in possession who was also in default. The lessor sought ejectment and the appointment of a receiver. On appeal, the appointment of a receiver was sustained in the interests of preserving the continued operation of the airport—in the teeth of the fact that the lessee was able to post a \$300,000 bond against its assignee, and apparently upon the unstated ground that the municipality would have been unable to maintain the airport if possession had been awarded to it on its cross action of ejectment. If the municipality ultimately loses on the merits, its potential liability to the other parties is left unclear because no security is required of a creditor seeking the appointment of a receiver, a contrary rule being applicable if the preliminary relief had been granted in ejectment.¹⁹⁰ In any event, if the municipality ultimately wins on the merits, it must face its responsibility of running the airport.

The order of appointment usually commissions a receiver to recapture assets for the benefit of creditors and interested parties.¹⁹¹ Assets in the debtor's possession at the time of appointment pass to the custody of the receivership court. Hence, the debtor who fails to make them available to the receiver and third persons intermeddling with such property may be subjected to a turnover order and an accounting by the receivership court in summary proceedings.¹⁹² Third persons claiming title to property in the custody of the receivership court must file a reclamation petition with the court controlling the property, where rights will be determined speedily

¹⁸⁸365 N.E.2d 783 (Ind. Ct. App. 1977).

¹⁹⁰It seems that a municipality may have been required to furnish bond under the ejectment statute. *See ch. 9, § 1, 1931 Ind. Acts 14* (repealed 1969). No bond or security is generally required of a party seeking a receiver pendente lite, but this is subject to question, since the receivership involves what is, in effect, a preliminary injunction. *See IND. R. TR. P. 65(C)*. While no bond is required of municipalities and governmental branches seeking a preliminary injunction, liability will be imposed if the government ultimately loses on the merits. *IND. R. TR. P. 65(C)*.

¹⁹¹The general power of a receiver over property and to bring suit to recover assets is recognized by IND. CODE § 34-1-12-7 (1976).

¹⁹²*Kist v. Coughlin*, 222 Ind. 639, 656, 57 N.E.2d 199, 205, *modified on other grounds*, 222 Ind. 659, 57 N.E.2d 586 (1944) (receiver "has the authority to request the court to exercise summary jurisdiction over persons or corporations who deny or interfere with his right to possession, where the property is constructively in his possession"); *Universal Credit Co. v. Talcott (In re Savage)*, 213 Ind. 228, 12 N.E.2d 141 (1938) (indicating that person intermeddling with assets that pass to assignee for benefit of creditors could be held in contempt). This also is the rule in bankruptcy. *Cf. Worthington v. Danning (In re Goldstein, Samuelson, Inc.)*, 517 F.2d 324 (10th Cir. 1975) (bankruptcy court had summary jurisdiction over funds in hands of bankrupt's agent at the time of the petition).

in the exercise of equity power.¹⁹³ But what of claims of the receiver over funds owing to the debtor by third persons or the debtor's assets in the possession of third parties at the time of receivership? How should the receiver go about establishing his rights? This question was posed in *McCollum v. Malcomson*,¹⁹⁴ where the receivership court had ordered a stranger in possession to show cause why he should not turn over property or pay money to the receiver. After a summary hearing on short notice, the trial court ordered the stranger to pay \$25,000.¹⁹⁵ On appeal, the court of appeals held that a receiver or liquidator must pursue his remedies against third persons indebted to the debtor or in possession of receivership assets at the time of appointment by full plenary proceedings in a proper court as if he were the debtor or creditor whom he represents. Summary procedures followed by the trial court were improper. A similar rule is recognized in bankruptcy¹⁹⁶ where practice recognizes that a person improperly subjected to summary proceedings may waive his right to a plenary hearing in another court.¹⁹⁷ While this issue was not considered by *McCollum*,¹⁹⁸ a litigant confronted with improper summary procedures would be wise to make prompt objec-

¹⁹³Cf. *Fletcher Sav. & Trust Co. v. American State Bank*, 196 Ind. 118, 147 N.E. 524 (1925) (claimant had right in "equity" to funds held by receivership debtor but carried burden of proof). This is the rule applied in liquidation of decedents' estates. *Isbell v. Heiny*, 218 Ind. 579, 33 N.E.2d 106 (1941). But cf. *Collinson v. McNutt*, 231 Ind. 605, 108 N.E.2d 700 (1952). It also is the rule in bankruptcy. *Grimstad v. Red Owl Stores (In re Cabeza Supermarket, Inc.)*, 406 F. Supp. 345 (D.N.D. 1976) (trustee sold property subject to reclamation).

¹⁹⁴358 N.E.2d 177 (Ind. Ct. App. 1976).

¹⁹⁵The receiver over assets of a corporation contended that officers of the corporation had contracted in their individual names to purchase land from the defendant-vendor and had made a down payment to the vendor of \$25,000 with corporate funds. When the defendant refused installment payments from the receiver, he was ordered to show cause why he should not pay \$25,000 to the receiver. A hearing was held 14 days later, and 5 days after the hearing the court order directed the vendor to pay the sum to the receiver. *Id.* at 178-79.

¹⁹⁶The general rule in bankruptcy is that title to assets not in the actual possession of the debtor at the time of the petition must be resolved by plenary proceedings brought by the trustee in the right of the bankruptcy debtor. To this rule a number of exceptions have been recognized, including (1) waiver by failure to object, (2) cases where the claim of the third party is colorable or without substance, (3) cases where the third party has filed a claim and the trustee asserts his right by setoff, and (4) special statutory provisions. The rule was recently recognized in *Pressler v. Haab (In re Alliance Beverage Co.)*, 420 F. Supp. 437 (N.D. Ind. 1976) (liability of officers of a debtor corporation for breach of fiduciary duties to be determined by plenary proceedings).

¹⁹⁷*Cline v. Kaplan*, 323 U.S. 97 (1944). Failure to object by first pleading or motion constitutes a waiver under the new rules in Bankruptcy. Bankruptcy Rule 915.

¹⁹⁸The issue was raised in a direct appeal that did not decide the merits, but the point at which objection to the summary procedure was made was not stated in the opinion.

tion at the hearing in the receivership court to avoid the possibility of waiver.

Two other recent decisions recognize the receivership as an extraordinary remedy that should not be taken lightly. In one, the Indiana Supreme Court granted prohibition against a court appointing a receiver without service of notice upon the debtor.¹⁹⁹ In the other,²⁰⁰ the court of appeals reversed a trial court decision that denied the appointment of a receiver over a surviving partner who failed to account and make disclosure to the representative or beneficiaries of the decedent's estate, contrary to the mandate of a statute providing for a receiver.²⁰¹ However, the court sent the case back for a complete audit without specifically directing the appointment of a receiver.

12. *Creditors' Rights in Decedents' Estates.*—A general creditor must file his claim within the statutory time frame (i.e., five months after the first published notice of administration, which must be commenced within one year of death) or lose his rights against the decedent's estate.²⁰² *Paidle v. Hestad*²⁰³ applied a recognized exception or qualification to the rule that allows a secured creditor to pursue his rights in rem against property furnished by the decedent. His lien or claim to the property need not be filed with the estate and will survive administration.²⁰⁴ In this case, a co-owner made improvements upon land and paid taxes in excess of his share. His claim of contribution was recognized as an equitable lien upon the land that survived administration without the need for filing a claim.²⁰⁵ However, a lienholder's interest that is unperfected may be cut off by a bona fide purchaser from the representative, heir, or devisee,²⁰⁶ and in the case of personal prop-

¹⁹⁹State *ex rel.* Mammonth Dev. & Constr. Consultants, Inc. v. Superior Court, 357 N.E.2d 732 (Ind. 1976).

²⁰⁰Pearson v. Hahn, 352 N.E.2d 767 (Ind. Ct. App. 1976).

²⁰¹IND. CODE § 23-4-3-5 (1976).

²⁰²*Id.* § 29-1-14-1. Exceptions to this rule are recognized throughout the Probate Code. See note 204 *infra*.

²⁰³348 N.E.2d 678 (Ind. Ct. App. 1976).

²⁰⁴The Indiana Probate Code expressly provides that the statute requiring claims to be filed shall not "prevent any action or proceeding to enforce any mortgage pledge or other lien upon property of the estate." IND. CODE § 29-1-14-1(e) (1976). This follows pre-Code law. *Beach v. Bell*, 139 Ind. 167, 38 N.E. 819 (1894). It is interesting to note that a perfected lien upon property passing to a trustee in bankruptcy or a receiver will survive administration if no claim is filed or if his title is not barred by proceedings in the liquidation, in meeting due process requirements, or estoppel. Compare *Martin v. Adams Brick Co.*, 180 Ind. 181, 102 N.E. 831 (1913) (receivership) with *Griffin v. Franklin Fin. Co.*, 139 Ind. App. 513, 221 N.E.2d 362 (1966) (bankruptcy).

²⁰⁵See discussion at note 53 *supra*.

²⁰⁶A bona fide purchaser at the representative's sale will take priority over an unperfected lien upon land. *Vincennes Sav. & Loan Ass'n v. St. John*, 213 Ind. 171, 12

erty, possibly by the representative, if the estate is insolvent.²⁰⁷ He may also be barred by administration proceedings dealing with the property if he is a party or bound on principles of estoppel. In its broadest connotation, the case stands for the rule that a legal or equitable interest in property will withstand death and administration unless barred by proceedings meeting due process or commercial principles protecting purchasers and creditors.²⁰⁸ In *Leazenby v. Clinton County Bank & Trust Co.*,²⁰⁹ the court of appeals also recognized the "Dacey Trust" (revocable trust) as a vehicle by which the settlor can cheat his wife out of her statutory rights. Followed to its disgraceful conclusion, a settlor of a revocable trust may also use the device to cheat creditors,²¹⁰ which raises the hope that this decision will promptly be reversed.

E. Suretyship

Several recent decisions dealt rather cavalierly with interesting problems of suretyship. The oral promise of an officer of a parent corporation to stand good for credit furnished a subsidiary corpora-

N.E.2d 127 (1938). A bona fide purchaser from an heir or devisee will cut off a prior unperfected lien upon land. *Meikel v. Borders*, 129 Ind. 529, 29 N.E. 29 (1891); *Guynn v. Wabash County Loan & Trust Co.*, 53 Ind. App. 391, 101 N.E. 738 (1913).

²⁰⁷Under the U.C.C., an unperfected security interest in personal property will be cut off by a lien creditor who becomes such without knowledge. IND. CODE § 26-1-9-301(1)(b) (1976). A "representative" of creditors will cut off the unperfected security interest if any creditor he represents is without knowledge. A representative of a decedent's estate is not expressly included as a "representative" within the above statute. *See id.* § 26-1-9-301(3). However, a representative of an insolvent decedent's estate is defined as a "creditor." *Id.* § 26-1-1-201(12). One decision holds that an unperfected security interest will not be defeated by creditors, without knowledge, represented in an insolvent estate. *Estate of Hinds*, 8 U.C.C. REP. SERV. 3 (Cal. App. 1970). This decision is highly questionable.

²⁰⁸*Pattison v. Hogston*, 90 Ind. App. 59, 157 N.E. 450 (1927). The Probate Code requires "claims" to be filed within the appropriate time limitations but excludes enforcement of liens. *See IND. CODE § 29-1-14-1(e)* (1976). However, it is doubtful that an action to establish rights to property is a "claim" within the meaning of the Code. *Id.* § 29-1-1-3 (defined as including "liabilities of a decedent which survive, whether arising in contract or in tort or otherwise"). *Cf. Isbell v. Heiny*, 218 Ind. 579, 33 N.E.2d 106 (1941) (proceeding by owner to reclaim property in decedent's estate not a "claim"). *See also Rush v. Kelley*, 34 Ind. App. 449, 73 N.E. 130 (1905). Case law has not made it clear whether or not the owner of an equitable title must establish his rights by filing a claim. *Compare Sheldmyer v. Bias*, 112 Ind. App. 522, 45 N.E.2d 347 (1942) (holding only that action of damages against vendor contracting to sell land must be presented as a claim) *with Rowley v. Fair*, 104 Ind. 189, 3 N.E. 860 (1885) (trust funds passing to representatives continued to be held by latter in same capacity).

²⁰⁹355 N.E.2d 861 (Ind. Ct. App. 1976).

²¹⁰A beneficiary of a trust with a power to appoint for his own benefit who was not the settlor was allowed to thumb his nose at creditors in *Irwin Union Bank & Trust Co. v. Long*, 160 Ind. App. 509, 312 N.E.2d 908 (1974). *See Bankruptcy Act, § 70a(3), 11 U.S.C. § 110(a)(3)* (1970).

tion was upheld against the parent,²¹¹ as well as a surety's oral assent to a modification of the principal's obligation to the creditor.²¹² The Seventh Circuit Court of Appeals sustained liability upon a revocable continuing guaranty by the chief shareholder and his wife on behalf of the principal corporation with respect to credit later furnished by the creditor after the principal had merged with another corporation that became publicly owned.²¹³ The case stands for the proposition that if *S* (surety) makes an offer to *C* (creditor) to become surety for *A* corporation, *C* may accept *S*'s offer by advancing credit to *B* corporation into which *A* has merged.²¹⁴ While the

²¹¹*Burger Man, Inc. v. Jordan Paper Prods. Inc.*, 352 N.E.2d 821 (Ind. Ct. App. 1976). In this case, the seller furnished paper products to *B* corporation, a wholly owned subsidiary of *C*. The president of *B*, who was a director of *C*, promised that *C* would stand good for merchandise furnished. The court held (1) that *C* was liable on the theory that the interlocking operations permitted piercing the corporate veil, particularly because *B* had conveyed property to *C* shortly before suit; and (2) that the statute of frauds provisions of the U.C.C. applicable to the sale of goods did not apply because the goods furnished were specially manufactured for the buyer. See IND. CODE § 26-1-2-201 (1976). The court did not directly raise the statute of frauds issue insofar as *C*'s promise was that of a surety. However, the "main purpose" rule recognized in Indiana should have been applicable to the promise of the parent corporation. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 143-44 (1950). See also *Board of Comm'r's v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N.E. 612 (1891). The surety promise of the parent corporation on behalf of its subsidiary is not ultra vires. *Kelly, Glover & Vale, Inc. v. Heitman*, 220 Ind. 625, 44 N.E.2d 981 (1942). But cf. *In re B-F Building Corp.*, 182 F. Supp. 602 (N.D. Ohio 1960) (principal and surety corporations owned by same directors and officers).

²¹²*Holmes v. Rushville Prod. Cred. Ass'n*, 353 N.E.2d 509, modified on other grounds, 355 N.E.2d 417 (Ind. Ct. App. 1976). The evidence established and the decision held that the surety orally assented to a modification of the repayment schedule for the loan made to the principal, but it seems that the statute of frauds question was not raised as to this point. The statute would not apply. *Everley v. Equitable Sur. Co.*, 190 Ind. 274, 130 N.E. 227 (1921). *Holmes* did hold that the written promise of a surety stating that it covered "an additional advance" met statute of frauds requirements with respect to a subsequently revised payment schedule on the ground that this promise incorporated by reference a later revised payment schedule. It appears, however, that this was treated as an advance waiver of payment terms.

²¹³*Cargill, Inc. v. Buis*, 543 F.2d 584 (7th Cir. 1976). The court cited IND. CODE § 23-1-5-5 (1976), which makes the surviving corporation liable for obligations of the merged corporations. This provision, however, was not applicable, since the credit for which suit was brought had been advanced to the new corporation after it was organized.

²¹⁴The decision was based upon the fact that the sureties (husband and wife) on the continuing guaranty offer were major shareholders in *A* corporation and *B* corporation in which it was merged, so that both the old and the new were "family" owned. On this, the chauvinistic opinion was in error. The husband was both the major shareholder and actor in the corporation, but the wife apparently owned only one share. She was held liable with her husband. The opinion also incorrectly defined a continuing guaranty as a contract. It is an offer to the principal until accepted by performance.

general rule is that if a creditor releases collateral the surety is discharged to the extent of the value of the security.²¹⁵ *Holmes v. Rushville Production Credit Association*²¹⁶ held that advance consent to "any partial release of the collateral" contained in the note signed by the surety constituted an exception to the rule. The creditor, who allowed the principal to sell most of the collateral and dissipate a part of the proceeds, was allowed to recover the resulting deficiency.²¹⁷

Indiana adheres to an old, questionable, and uncertain rule to the effect that a surety upon a "collateral contract of guaranty" will be discharged to the extent of ensuing injury unless the creditor gives him timely notice of default by the principal.²¹⁸ *Bowyer v. Clark Equipment Co.*,²¹⁹ applied this rule to an obligor on a continuing type of suretyship contract where the principal, who was a machinery dealer, had become delinquent upon his account with the creditor who supplied him merchandise. The surety was discharged when he was not informed of the default until after the principal became insolvent.²²⁰ The case is especially interesting because after default, the principal had brought himself current while solvent and then later defaulted on his accounts with the creditor at a time when he was insolvent. Hence, it was arguable that failure to give notice of the first default did not result in loss. Since the principal was insolvent at the time of the second default, no loss resulted from failure to give the surety notice of the first default. The court held otherwise. In another decision involving the guarantor of a lease of trucks,²²¹ the court found that the lessor-creditor had given the guarantor timely notice of the principal-lessee's default.

²¹⁵IND. CODE § 26-1-3-606 (1976).

²¹⁶353 N.E.2d 509, *modified on other grounds*, 355 N.E.2d 417 (Ind. Ct. App. 1976).

²¹⁷*Cf. White v. Household Fin. Corp.*, 158 Ind. App. 409, 302 N.E.2d 828 (1973) (consent to release of collateral by surety did not constitute consent to release of the proceeds from its sale).

²¹⁸*Cf. Timberlake v. J.R. Watkins Co.*, 138 Ind. App. 554, 209 N.E.2d 909, (1965) (adopting position of *Restatement of Suretyship* to the effect that the policy of differentiating contracts of suretyship and guaranty by label is improper).

²¹⁹357 N.E.2d 290 (Ind. Ct. App. 1976). The case also held that a waiver of presentment and notice of dishonor did not constitute a waiver of the defense arising because of failure to give notice of default.

²²⁰*Cf. Mitchell v. St. Mary*, 148 Ind. 111, 47 N.E. 224 (1897) (waiver of presentment, protest, etc., held not to constitute a waiver of the creditor's obligation to bring prompt suit against defaulting principal as required by statute governing indorser's liability on nonnegotiable paper).

²²¹*Loudermilk v. Feld Truck Leasing Co.*, 358 N.E.2d 160 (Ind. Ct. App. 1976).

XVI. Taxation

*John W. Boyd**

A. Death Taxes

In a decision of some importance to estate and compensation planners, the First District Court of Appeals in *In re Estate of Bannon*¹ held that a payment to a widow of a deceased corporate employee pursuant to the terms of his employment contract was not subject to the Indiana inheritance tax.² The decision is also of more general importance in that it aligns Indiana with those jurisdictions accepting the so-called "ownership" theory of death taxation and rejects the "receipt" or "succession" theory.³

Bannon arose on the following set of facts. In 1969, the decedent and his employer entered into a ten-year employment contract whereby the decedent was to receive \$20,000 per year for the first five years of the contract period and \$10,000 per year for the second five years. In the event that the employee died before the end of the contract period and was survived by his wife, the employer was to pay her \$5,000 per year for the remainder of the contract period. Three years after the contract was entered into the employee died, and the employer took out an annuity payable to the widow for the remainder of the contract period.

Ruling that there was no transfer of a property interest from the decedent to his widow on the payment or obligation of payment of the annuity, the Marion Probate Court held that the annuity was non-taxable under the inheritance tax statute then in effect.⁴ The court of appeals was then faced with the question of whether a taxable event took place. Making that determination required the court to first decide which general theory of death taxation was reflected in the Indiana statutory scheme and then, applying that theory to

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¹358 N.E.2d 215 (Ind. Ct. App. 1976).

²Ch. 75, §§ 1, 33, 1931 Ind. Acts 192 (repealed 1976) (present Indiana inheritance tax provision now codified at IND. CODE §§ 6-4.1-1-1 to -10-6 (1976)).

³General discussion of the two theories may be found in Brink, *Minnesota Inheritance Tax: Some Problems and Solutions*, 43 MINN. L. REV. 443 (1959); and Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance Taxes*, 39 MICH. L. REV. 856 (1941).

⁴358 N.E.2d at 216.

the facts, to decide whether the annuity fell within the statutory sweep.

The court had little problem in concluding that the inheritance tax statute then in effect⁵ utilized the "ownership" concept. Under the "ownership" or, as it is also known, the "divestment" theory, property in which a decedent had no interest at the time of his death will not be subject to taxation when it passes to a transferee at decedent's death or upon a death-related contingency.⁶ By way of contrast, the "succession" or "receipt" theory is based upon the premise that regardless whether the transferor-decedent retained an interest in property during his lifetime, if there is an enlargement of the interest of a beneficiary at the decedent-transferor's death, then there is a taxable event.⁷ The court noted that the specific inclusions in the inheritance tax statute⁸ involved situations where the decedent had some degree of control over the property at his death. More fundamentally, the court stated:

[T]he "ownership" test reflects a basic distinction which underlies our inheritance tax system. The inheritance tax is directed toward transfers of property by will, by intestate succession, and by other such transfers that substitute for testamentary depositions [sic]. The death tax is not intended to apply to absolute *inter vivos* gifts.⁹

Applying that distinction, the court found that the payment of the annuity was not subject to the inheritance tax. The employment contract was such that the decedent had no interest in the annuity that became payable to his widow. In this regard, special emphasis was placed upon the fact that the decedent did not have the power to change the beneficiary and thus had relinquished his interest in the amount payable to the widow upon entering into the agreement.¹⁰

Because the new inheritance tax statute encompasses the same types of transfers covered in the former statute,¹¹ it is safe to conclude that the result in *Bannon* would have been the same had the new act been applicable. On the general point of law involved in

⁵Ch. 75, §§ 1, 33, 1931 Ind. Acts 192 (repealed 1976).

⁶See Brink, *supra* note 3, at 444.

⁷See *id.*

⁸Ch. 75, § 1, 1931 Ind. Acts 192 (repealed 1976). The transfer provisions in the 1976 overhaul of the Indiana inheritance tax are codified at IND. CODE § 6-4.1-2-1 (1976).

⁹358 N.E.2d at 217.

¹⁰*Id.* at 218.

¹¹Compare IND. CODE §§ 6-4.1-2-1 to -4 (1976) with ch. 75, § 1, 1931 Ind. Acts 192 (repealed 1976).

Bannon, Indiana inheritance tax law is now congruent with federal estate tax law, which also reflects an "ownership" theory.¹²

One of the credits applicable against a decedent's federal estate tax is for the amount of state death taxes paid.¹³ The amount of death taxes imposed by most states is normally much less than the potential total credit available under the federal estate tax; accordingly, most states have enacted what are known in tax parlance as "pickup taxes."¹⁴ Such taxes impose an additional state tax equal to the amount by which the allowable credit under the federal estate exceeds the state death taxes. The dynamic effect of such taxes is not to increase the total tax liability for a decedent's estate but is instead to allow the states to collect a higher percentage of the total tax liability of an estate.

In cases where an Indiana resident dies holding real or personal property in another state which is subject to a death transfer tax in that jurisdiction, a pickup tax provision in that state may likewise apply to effect some redistribution of the gross amount of death tax liability.¹⁵ Such was the case in *State v. Purdue National Bank*,¹⁶ in which the Second District Court of Appeals construed the forerunner of the present Indiana pickup tax statute.¹⁷ In making the computation of the Indiana pickup tax under the former statute, pickup taxes paid to other states are not to be deducted from the allowable federal estate tax credit. The court noted that a parenthetical exclusion in the statute rendered it capable of no other construction.¹⁸ The effect of the former statute, as so construed, was the imposition of state death taxes that exceeded the allowable federal estate tax credit for state death taxes in cases where an Indiana resident died holding property in another state, which itself levied a pickup tax with respect to property of a nonresident decedent.¹⁹ The general theory of pickup taxation simply was inapplicable. The 1976 General Assembly may have rectified that theoretical anomaly in the recodification of inheritance and estate taxes, which replaced the

¹²I.R.C. § 2036, as amended by Tax Reform Act of 1976, Pub. L. No. 94-555, § 2009(a), 90 Stat. 1893; I.R.C. § 2037; *id.* § 2038, as amended by Tax Reform Act of 1976, Pub. L. No. 94-455, § 1902(a)(3), 90 Stat. 1804, 1852.

¹³I.R.C. § 2011, as amended by Tax Reform Act of 1976, Pub. L. No. 94-455, § 1902(a)(12)(B), 90 Stat. 1806.

¹⁴*E.g.*, IND. CODE §§ 6-4.1-11-1 to -2 (1976).

¹⁵Indiana has such a provision for nonresident decedents who die holding Indiana property. IND. CODE § 6-4.1-11-2(b) (1976).

¹⁶355 N.E.2d 414 (Ind. Ct. App. 1976).

¹⁷Ch. 276, § 1, 1965 Ind. Acts 764 (repealed 1976) (present pickup tax statutes are codified at IND. CODE §§ 6-4.1-11-1 to -6 (1976)).

¹⁸355 N.E.2d at 416.

¹⁹*Id.*

old article 4 of title 6 of the Indiana Code with a new article 4.1.²⁰ The 1976 enactment was intended to be a codification and restatement of applicable or corresponding provisions of the repealed laws, without any substantive changes.²¹ The new pickup tax provision, however, does not include the parenthetical exclusion upon which the *Purdue National Bank* panel seized.²² Accordingly, it is submitted that the Indiana pickup tax is now in line with the general theory of pickup taxation.

B. Gross Income Tax

1. *Affiliated Corporations.*—Section 6-2-1-14(a) of the Gross Income Tax Act²³ provides that affiliated corporations “shall have the privilege of making a consolidated [gross income tax] return.”²⁴ The statute requires that an affiliated group elect at the time of filing its first annual return whether to file on a consolidated basis.²⁵ Regulation 800 of the Indiana Gross Income Tax Regulations,²⁶ promulgated by the Department of Revenue, provided that when an affiliated group of corporations desired to file a consolidated return the group had to file an election with and receive permission from the Department prior to the filing of the first quarterly return for that year, or before filing the annual return in cases where no prior quarterly return had been filed.

The First District Court of Appeals struck down regulation 800 as exceeding the limits imposed upon the department in its rule-making capacity in *Indiana Department of State Revenue v. Sohio Petroleum Co.*²⁷ The court stated that regulation 800 mandated an affiliated corporation to take action to avail itself of the privilege of

²⁰Act of Feb. 18, 1976, Pub. L. No. 18, §§ 1-2, 1976 Ind. Acts 69-104 (codified at IND. CODE 6-4.1-1-1 to -12-11 (1976)).

²¹Pub. L. No. 18, § 3, 1976 Ind. Acts 104.

²²Compare IND. CODE § 6-4.1-11-2(a) (1976) with ch. 276, § 1(a), 1965 Ind. Acts 764 (repealed 1976).

²³The statute, IND. CODE § 6-2-1-14(a) (1976), provides in part:

Corporations will be deemed to be affiliated within the meaning of this section if at least eighty per cent (80%) of the voting of one (1) corporation (exclusive of directors' qualifying shares, shall be owned by the other corporation. Every corporation affiliated with another, as defined above, shall be deemed to be affiliated with every corporation which is affiliated with such corporation.

²⁴*Id.* One of the benefits incident to the election of filing a consolidated return is that dividends paid by one member of the affiliated corporate group to another may be eliminated from the group's gross income. *Id.* Such a provision is, of course, fair and logical in terms of gross income taxation because the taxable entity, the group, has not derived any real income.

²⁵*Id.*

²⁶IND. ADMIN. R. & REGS. § (6-2-1-14)-1 (Burns 1976).

²⁷352 N.E.2d 95 (Ind. Ct. App. 1976).

filing a consolidated return prior to the time set in the statute.²⁸ The court noted that insofar as regulation 800 required an affiliated group to obtain permission to file a consolidated return in its first year, it extended the power of the department beyond that granted in the statute. By its very terms, the statute empowers the department to require prior permission only when an affiliated group, the members of which filed separate returns during the existence of the group, seeks to switch to the consolidated return format or when an affiliated group that had previously been filing on a consolidated basis seeks to have its members file separate returns.²⁹

2. *Exemptions.*—*Sohio Petroleum* also clarified a question regarding an exemption from gross income for purposes of the Indiana Gross Income Tax. Under section 6-2-1-1(m) of the Indiana Code,³⁰ for nonresident individuals and Indiana corporations authorized to and doing business in other jurisdictions, gross income does not include gross receipts received from sources outside of Indiana where the receipts are derived from a trade or business located in and regularly carried on outside of Indiana. For a corporation to qualify for exemption under section 6-2-1-1(m), it must (1) be incorporated under the laws of Indiana, (2) do business in another state, and (3) derive income from sources outside of Indiana.³¹

Sohio Petroleum's predecessors in interest were Old Ben Coal Corp., a Delaware corporation having its principal executive office in Illinois; and Old Ben Coal, Inc. and Kings Mine Coal Corporation, both of which were Indiana corporations. The Delaware corporation owned all of the stock of the Indiana corporations. Although the Indiana corporations had their production facilities in Indiana, their management functions were concentrated in the Illinois office of the parent corporation. Old Ben Coal, Inc. owned one-half of the common stock of Algers, Winslow, and Western Railroad (AWW), an Indiana corporation operating in Indiana. Old Ben Coal, Inc. received dividends from AWW in 1970 and 1971 but did not report the dividends as gross income on its consolidated return. The AWW stock certificates were kept at the Illinois corporate offices; therefore, the taxpayers contended that the dividends were exempt from gross income under section 6-2-1-1(m).

The taxpayers relied on an older Indiana Supreme Court case³² in which, on similar facts, certain intangible property was found to

²⁸IND. CODE § 6-2-1-14(a) (1976).

²⁹352 N.E.2d at 98.

³⁰IND. CODE § 6-2-1-1(m) (1976).

³¹Indiana Dep't of Revenue v. Frank Purcell Walnut Lumber Co., 152 Ind. App. 122, 128, 282 N.E.2d 336, 340 (1970).

³²Miami Coal Co. v. Fox, 203 Ind. 99, 176 N.E. 11 (1931).

be so intertwined and affixed to the corporate taxpayer's Chicago office that its "business situs" was in Illinois. That court had concluded that the intangible property came within the operation of the concept that a state cannot impose its personal property tax upon the value of personal property situated outside of that jurisdiction.³³ The Department of Revenue incorporated the personal property tax business situs rule into its gross income tax regulations.³⁴

In *Sohio Petroleum*, the court of appeals preserved the conceptual distinction between income and property taxes and refused to apply the portions of the gross income tax instructions incorporating the business situs rule.³⁵ The court stated that the determinative factor for qualification under the exemption in section 6-2-1-1(m) is the location of the corporation that pays dividends on stock held by an Indiana corporation at its out-of-state principal place of business.

3. *Ad Valorem Taxes.*—(a) *Property Tax Disaster Reassessment.*—Indiana Code section 6-1-26-7³⁶ provides that in case of a disaster that destroys a substantial amount of property within any township, the State Board of Tax Commissioners shall have the area where the losses occurred surveyed and shall order a reassessment of the property. The disaster reassessment procedure is actuated by petition of taxpayers suffering damage by reason of disaster and applies to both real and personal property.

*Indiana State Board of Tax Commissioners v. Holthouse Realty Corp.*³⁷ considered the state's position that the disaster reassessment provision did not apply to taxpayers whose losses had been fully compensated by proceeds from insurance policies. The case arose on the following set of facts. Substantial amounts of property were destroyed by an explosion in Richmond in 1968. Approximately seven months later, several taxpayers petitioned for reassessment of personal property pursuant to section 6-1-26-7 and improvements to real estate that had been damaged by the explosion. In early 1971, the State Board of Tax Commissioners issued an order that approved certain petitions for reassessment but denied reassessments for those taxpayers whose losses had been fully compensated by insurance proceeds. In 1972, the aggrieved taxpayers filed their action

³³*Id.* at 114-15, 76 N.E. at 17.

³⁴IND. DEPT OF REV. INSTRUCTIONS 3-11, 3-12.

³⁵In this regard, the court relied upon *Baker v. Compton*, 247 Ind. 39, 211 N.E.2d 162 (1965), which held that an appellate court is not required to follow an incorrect interpretation of a statute by an agency charged with administering the statute, notwithstanding the axiom that a court should give deference to agency interpretations. 352 N.E.2d at 101.

³⁶IND. CODE § 6-1-26-7 (1976).

³⁷352 N.E.2d 535 (Ind. Ct. App. 1976).

for review.³⁸ Two years later the trial court entered judgment for the taxpayers, finding that the statute did not except situations where insurance covered the loss.³⁹ The trial court noted that there was no reason to penalize those prudent enough to insure their property by excepting them from the statutory relief, and if the legislature had so intended, it would have so provided.⁴⁰

After disposing of collateral issues,⁴¹ Judge Lowdermilk's opinion for the First District Court of Appeals set forth the "crucial issue" as being whether the legislature intended to deny statutory relief to taxpayers who have recovered insurance proceeds on property losses. Focusing on the mandatory language of the statute, the court found no need to construe the statute.⁴² The clear purpose of the statute being to provide relief in the form of a revaluation of the damaged property and the attendant lesser tax burden, the court was at a loss to see how the incidence of insurance would affect that purpose. The court noted that the statute was designed to provide relief to all taxpayers adversely affected within the meaning of the statute and not to award compensation on account of losses. Accordingly, the state's argument was rejected, and the statute was given its intended full scope of coverage.

(b) *Valuation of Commingled Fungible Goods.*—The Indiana Constitution provides: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation; and shall prescribe regulations to secure a just valuation for taxation of all property"⁴³ The Third District Court of Appeals had occasion to apply that constitutional provision in *Indiana State Board of Tax Commissioners v. Lyon & Greenleaf Co.*⁴⁴ The case concerned the 1969 personal property tax return of Lyon & Greenleaf, a federally licensed grain warehouse that stored raw wheat belonging to farmers, other grain elevators, and itself. The raw wheat was kept in common storage facilities in such a manner that wheat belonging to Lyon & Greenleaf was indistinguishable from the

³⁸At that time review was pursuant to ch. 231, § 1, 1963 Ind. Acts 317 (repealed 1975) (present review provision codified at IND. CODE § 6-1.1-15-5 (1976)).

³⁹352 N.E.2d at 537.

⁴⁰*Id.*

⁴¹The court of appeals had little trouble in finding that there was substantial evidence to support the finding that the board did not order reassessment of the aggrieved taxpayers property pursuant to ch. 107, § 1, 1969 Ind. Acts 249 (repealed 1976) (current version at IND. CODE § 6-1.1-4-11 (1976)). The trial court's finding that prudent taxpayers carry insurance was found to be erroneous inasmuch as the record contained no evidence to support such a finding. That error was found to be "harmless error" under IND. R. TR. P. 61, making reversal unwarranted. 352 N.E.2d at 538.

⁴²352 N.E.2d at 539.

⁴³IND. CONST. art. 10, § 1.

⁴⁴359 N.E.2d 931 (Ind. Ct. App. 1977).

wheat that it held as a warehouseman. An audit of the 1969 return resulted in a recommendation to the State Board of Tax Commissioners that the assessed valuation of Lyon & Greenleaf's business personal property be more than tripled. Lyon & Greenleaf invoked the then applicable review procedure following the Board's issuance of its "Notice of Assessment."⁴⁵

Lyon & Greenleaf based its assessment on a "true cash value" basis, obtaining the value from the State Board of Tax Commissioners' Bulletin No. 9, entitled "Assessment of Farm Livestock and Commodities for the Year 1969." The board sought to have the property assessed as inventory because Bulletin No. 9 provided: "All livestock, grain or other farm commodities held, possessed or controlled by a dealer or manufacturer shall be assessed as inventory"⁴⁶ The lower of actual or current replacement cost was to provide the value for inventory. On review of the reassessment, the trial court found that the effect of using two different bases—one for the assessment of raw wheat belonging to warehousemen and one for the assessment of raw wheat belonging to farmers—was to assess identical commingled raw wheat held in the same storage facility at differing rates depending upon who owned the wheat. That court ruled that the administrative standard, which resulted in values for commingled wheat that differed solely on the basis of ownership, constituted an unreasonable classification in violation of article 10, section 1 of the Indiana Constitution.⁴⁷

In affirming the trial court, the court of appeals began its analysis with an examination of the factors that form the constitutional basis of a valid tax law. Those factors, derived from article 10, section 1 of the Indiana Constitution, are (1) uniformity and equality in taxation, (2) uniformity and equality as to rate of taxation, and (3) a just valuation for taxation of all property.⁴⁸ The court stated that the purpose of the three requirements is to distribute the burden of taxation on principles of uniformity, equality, and justice. As the case turned on the "classification" question, the court noted that Indiana case law⁴⁹ recognizes that different classes of property may be

⁴⁵The procedure for review of reassessments applicable at the time the dispute in the instant case arose may be found at ch. 231, § 1, 1963 Ind. Acts 317 (repealed 1975) (procedure for judicial review of final determinations of the State Board of Tax Commissioners now applicable is codified at IND. CODE § 6-1.1-15-5 (1976)).

⁴⁶359 N.E.2d at 933.

⁴⁷*Id.*

⁴⁸Wright v. Steers, 242 Ind. 582, 179 N.E.2d 721 (1962), and Finney v. Johnson, 242 Ind. 465, 179 N.E.2d 718 (1962), were cited by the *Lyon & Greenleaf* court as establishing the constitutional bases of a valid tax law. 359 N.E.2d at 933.

⁴⁹See Smith v. Stephens, 173 Ind. 564, 91 N.E. 167 (1910); Board of Comm'r's v. Johnson, 173 Ind. 76, 89 N.E. 590 (1909); Clark v. Vandalia R.R., 172 Ind. 409, 86 N.E. 851 (1909); State *ex rel.* Lewis v. Smith, 158 Ind. 543, 63 N.E. 25 (1902).

necessary in order to achieve a just and uniform taxation. However, such classifications are permissible only when used to achieve uniformity and equality in result,⁵⁰ and they must be based upon differences naturally inhering in the subject matter of the legislation.⁵¹

The Board's argument to the court was that a uniform basis of valuation (actual cost) was applied, and that the difference in assessed values under the regulatory schemes was due to differences in cost to the farmer, who presumptively had grown the wheat, and the warehouseman, who presumptively had acquired the wheat by sale or exchange. Uniformity in valuation method, however, is not one of the constitutional prescriptions for a valid tax law;⁵² instead, as the court noted, the constitution requires a system that will provide a just valuation of all property.⁵³ The court recognized that cost was an appropriate factor to weigh in arriving at a just valuation, but that cost, in itself, is not a condition sufficient to meet the constitutional standard.⁵⁴

Without setting forth any broad standard of general application for determining what constitutes a "just valuation," the court struck down the valuation system at issue in *Lyon & Greenleaf* because it placed an artificial distinction on the value of raw wheat. To the court, "[t]he resulting inequities of a system which places differing values on a fungible commodity commingled in the same storage facility are too great to warrant a valuation under such method."⁵⁵ *Lyon & Greenleaf* does, however, clearly establish as part of Indiana constitutional tax law the somewhat self-evident proposition that identical property must be assessed at the same tax value.

(c) *Commerce Clause Exemption*—In *Indiana State Board of Tax Commissioners v. Philco-Ford Corp.*,⁵⁶ the First District Court of Appeals upheld a denial of a property tax exemption that Philco-Ford had claimed under the commerce clause exemption to state ad valorem taxes.⁵⁷ The case arose on the following set of facts. Philco-

⁵⁰359 N.E.2d at 934.

⁵¹*Id.* (citing *State ex rel. Lewis v. Smith*, 158 Ind. 543, 580, 64 N.E. 18, 20 (1902)).

⁵²See *Wright v. Steers*, 242 Ind. 582, 179 N.E.2d 721 (1962); *Finney v. Johnson*, 242 Ind. 465, 179 N.E.2d 718 (1962).

⁵³See *Louisville & New Albany R.R. v. State ex rel. McCarty*, 25 Ind. 177 (1865).

⁵⁴359 N.E.2d at 934.

⁵⁵*Id.* at 935.

⁵⁶356 N.E.2d 1379 (Ind. Ct. App. 1976).

⁵⁷The exemption claimed by Philco-Ford was permitted by ch. 398, § 2, 1965 Ind. Acts 1244 (repealed 1975) (current version codified at IND. CODE § 6-1.1-10-30 (1976)). That statute provided, in pertinent part:

[P]ersonal property of residents or nonresidents of the state placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination and so designated on the original bill of lading, shall not, while so in the original package in such warehouse,

Ford owned certain appliances that were manufactured at its Connersville, Indiana plant and then shipped by rail and truck to a warehouse in Muncie, Indiana. The appliances were stored in their original packages, and those that had been shipped by rail were covered by bills of lading listing Muncie as their destination but were further marked, "for storage in transit to an out of state des[tination]." Because shipments out of the warehouse were controlled by Philco-Ford's Philadelphia office, which would draw a new bill of lading to cover outgoing items, and because the outgoing shipments generally were pulled from the entire warehouse stock, the lower court recognized that there was no correlation between the number of appliances stored with the original "out of state" bills and the number of appliances that actually reached out of state destinations, even though Philco-Ford intended to put most of its appliances into interstate commerce.⁵⁸ Philco-Ford claimed exemptions on its property tax returns for the appliances covered by the original bills of lading.⁵⁹

On appeal, Judge Lowdermilk stated that the appliances did not move into the stream of interstate commerce until they were shipped or actually committed for shipment to an out of state location. Shipments of the goods and storage of the goods in the Muncie warehouse were held to be preparations for entry into the stream of interstate commerce because some of the goods could have been—and indeed some were—sold or otherwise disposed of in Indiana.⁶⁰ Because the statutory exemption is limited to the compass of the commerce clause, the court upheld the board's denial of the claimed exemption.⁶¹

be subject to tax imposed by this act. . . . In construing this action, goods, wares, and merchandise shall be exempt only to the extent that they are exempt from ad valorem taxes under the commerce clause of the Constitution of the United States.

⁵⁸356 N.E.2d at 1381. Some of the appliances obviously were transmitted to Indiana destinations.

⁵⁹The Board of Tax Commissioners denied the exemptions, but, on review, the Delaware Superior Court found that the warehouse storage was part of the movement in interstate commerce and concluded that the board acted arbitrarily and capriciously in denying the exemptions. *Id.*

⁶⁰The court relied upon *Minnesota v. Blasius*, 290 U.S. 1, 12 (1933), in which the Court ruled that property is subject to the taxing power of the states when it has come to rest within a state and may be disposed of at the pleasure of its owner either within or without that state.

⁶¹The court also rejected Philco-Ford's contention that the claimed exemption in their case was controlled by a case from the previous year that was based upon similar facts, *Whirlpool Corp. v. State Bd. of Tax Comm'rs*, 338 N.E.2d 501 (Ind. Ct. App. 1975), noted in Allington, *Taxation, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 340, 358 (1976), because the result in *Whirlpool* was based on an acquiescence theory which had no application to the issues in *Philco-Ford*. Further-

4. *Sales Taxes.*—In *Indiana Department of State Revenue v. Associated Beverage Co.*,⁶² the First District Court of Appeals held that a manufacturer who purchases empty bottles for the purpose of filling them with its product, in order to sell its bottled product to the public, purchases the bottles for resale and not for its own use. Therefore, such purchases are exempt from state gross retail (sales) tax under the resale exemption.⁶³

Another exemption to the state sales tax is extended to the sale, storage, use, or other consumption in Indiana of tangible personal property or service that is directly consumed in the rendering of public transportation of persons or property.⁶⁴ In *Indiana Department of State Revenue v. Indianapolis Transit System, Inc.*,⁶⁵ the First District Court of Appeals found that the foregoing exemption applied to a city's charter bus service. In so ruling, the court rejected the department's argument that the bus charters were leases of tangible personal property and therefore subject to tax under Indiana Code section 6-2-1-38(1),⁶⁶ which makes leases by all persons except public utilities subject to tax. Deciding whether the charter system created a lessor-lessee relationship was a question of fact dependent upon possession and right to control.⁶⁷ The indicia of a lease were found not to be present as the court recognized a distinction between charters and leases.⁶⁸

more, the court rejected Philco-Ford's claim that a regulation exempted the property from tax. The regulation, STATE BOARD OF TAX COMMISSIONERS REGULATION No. 16 (1966), however, stated in § 1.7 that it was not to be extended to provide exemptions beyond those required by the commerce clause. Additionally, the court noted that Philco-Ford had failed to satisfy § 1.6 of the regulation, which defined the statutory term "original package." That definition required the original bill of lading to include a designation that the package is committed for transshipment to an out of state destination. The court stated that Philco-Ford had failed to satisfy the requirements in that the original bills of lading did not commit the appliances to definite out of state locations but instead listed Muncie as their destination with the additional designation, "for storage in transit to an out of state des." 356 N.E.2d 1382-83.

In light of the court's focus in *Philco-Ford*, the practical reading of the case calls for strict compliance with the statute and the departmental regulations in order to assure coverage under the exemption.

⁶²353 N.E.2d 544 (Ind. Ct. App. 1976).

⁶³IND. CODE § 6-2-1-39(b)(9) (1976).

⁶⁴*Id.* § 6-2-1-39(b)(4).

⁶⁵356 N.E.2d 1204 (Ind. Ct. App. 1976).

⁶⁶IND. CODE § 6-2-1-38(l) (1976).

⁶⁷356 N.E.2d at 1209-10. In regard to the right to control question, the court enumerated the following factors, gleaned from an Oregon case, *Thomas v. Foglio*, 225 Ore. 540, 358 P.2d 1066 (1961), as helpful in resolving the issue: (1) employment of the driver, (2) right to direct movement of the bus, (3) obligation to pay costs and repairs, (4) obligation to pay fuel costs, (5) responsibility of garaging the vehicle, and (6) payment of insurance and license fees.

⁶⁸356 N.E.2d at 1210.

5. *Tax Procedure—The Federal Tax Injunction Act.*—There is a longstanding federal judicial policy against interfering in matters of state taxation.⁶⁹ That policy has been codified in the Tax Injunction Act of 1937,⁷⁰ which precludes federal district courts from enjoining, restraining, or suspending the assessment, levy, or collection of a state tax in cases "where a plain, speedy and efficient remedy may be had in the courts of such State."⁷¹ The effect of the Act is to divest the district courts of jurisdiction over claims for equitable relief against state taxing authorities when the aggrieved taxpayer has a "plain, speedy and efficient remedy" in his state judicial system.⁷² The fact that an aggrieved taxpayer brings his claim under the Civil Rights Act of 1871⁷³ does not affect application of the Tax Injunction Act;⁷⁴ and contrary to the general rule of not requiring exhaustion of state remedies in section 1983 cases,⁷⁵ when the Tax Injunction Act is applicable all available state administrative and judicial remedies must be exhausted before a federal court may entertain a section 1983 claim based upon state tax law.⁷⁶

As Chief Judge Eschbach stated in *Green v. Klinkofe*,⁷⁷ the central issue in a case where the Tax Injunction Act is called into question is whether the state courts provide "a plain, speedy and efficient remedy" to the aggrieved taxpayer. In *Green*, the United States District Court for the Northern District of Indiana had occa-

⁶⁹See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *First Nat'l Bank v. Board of County Comm'r's*, 264 U.S. 450 (1924).

⁷⁰28 U.S.C. § 1341 (1970).

⁷¹*Id.*

⁷²In other words, when applicable, the Tax Injunction Act effectively ousts a federal court of jurisdiction and mandatorily forecloses the court from granting relief. *Kimmey v. H.A. Berkheimer, Inc.*, 376 F. Supp. 49, 53 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1394 (3d Cir. 1975).

The jurisdictional bar of the Tax Injunction Act has been construed to apply to actions for declaratory relief as well as to actions for equitable relief. See *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F.2d 439 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); *Aluminum Co. of America v. Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967); *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966).

⁷³42 U.S.C. § 1983 (1970).

⁷⁴See, e.g., *Hickman v. Wujick*, 488 F.2d 875 (2d Cir. 1973); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967).

⁷⁵See *McNeese v. Board. of Educ.*, 373 U.S. 668 (1963). See generally Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565 (1975).

⁷⁶See, e.g., *Northern Natural Gas Co. v. Wilson*, 340 F. Supp. 1126 (D. Kan. 1971), *aff'd*, 405 U.S. 949 (1972); *Delaware, Lackawanna & W. R.R. v. Kingsley*, 189 F. Supp. 39 (D.N.J. 1960).

⁷⁷422 F. Supp. 1021 (N.D. Ind. 1976).

sion to consider the adequacy of the state remedy vis-a-vis taxpayers aggrieved by the provisions of the Indiana Gross Income Tax Act, which authorize tax collectors to levy upon the property of delinquent taxpayers without a prior adjudication of tax liability.⁷⁸ Plaintiff contended the provisions violated his fourteenth amendment rights to due process and equal protection and sought equitable and declaratory relief.⁷⁹ In Indiana, the exclusive statutory method of obtaining review of tax assessment is through payment of the tax and a claim for refund.⁸⁰ The Indiana Administrative Adjudication Act excepts decisions of the Department of Revenue and the State Board of Tax Commissioners from its general review provisions.⁸¹

The plaintiff contended that he was indigent and unable to pay the tax and to invoke the statutory refund procedure. In a similar situation where an Illinois taxpayer was unable to pay the tax due, the Seventh Circuit ruled that the Illinois refund procedure⁸² was unavailable.⁸³ If the analysis ended at that point, the jurisdictional bar of the Tax Injunction Act would have been inapplicable because plaintiff would not have had "a plain, speedy and efficient" state remedy through which he could raise his constitutional claim. The court, however, looked to the Indiana state courts to determine whether they had jurisdiction to hear the civil rights claim and grant the relief sought. Although the court noted that no reported decisions recognized that a federal civil rights claim pursuant to 42

⁷⁸IND. CODE § 6-2-1-18 (1976).

⁷⁹The case arose on the following set of facts. Plaintiff was an Allen County resident who had failed to pay an alleged gross income tax assessment. Plaintiff alleged that he was unable to pay the tax. The defendants were the administrator of the Gross Income Tax Division of the State Department of Revenue, the Division itself, the Sheriff of Allen County, and the Clerk of Allen County. Plaintiff alleged that the Department of Revenue issued two collection warrants against him pursuant to IND. CODE § 6-2-1-18(b) (1976), which were subsequently filed with the Allen County Clerk and entered into the judgment docket of the circuit court of that county. Under the statute, the sheriff is directed to levy upon any property of the delinquent taxpayer once the warrant is entered in the record. *Id.*

Because such actions were authorized to be taken without any kind of hearing, plaintiff challenged the statute on procedural due process grounds. He further contended it violated the equal protection clause in that tax debtors to the state, unlike debtors to private parties, are denied a hearing prior to the entry of judgment. Making the requisite claims of irreparable injury and inadequate remedy at law, plaintiff sought declaratory and injunctive relief against the statute and its enforcement. 422 F. Supp. at 1023-24.

⁸⁰IND. CODE § 6-2-1-19 (1976).

⁸¹*Id.* § 4-22-1-2.

⁸²ILL. ANN. STAT., ch. 120, § 675 (Smith-Hurd Supp. 1975-1976).

⁸³28 East Jackson Enterprises, Inc. v. Cullerton, 523 F.2d 439, 441 (7th Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

U.S.C. § 1983 could be brought in the state courts,⁸⁴ it noted that there is concurrent state and federal jurisdiction over section 1983 claims⁸⁵ and concluded that “[i]n view of the ‘harmonious relation’ which exists between the state and federal courts,” Indiana courts would entertain plaintiff’s federal constitutional claim.⁸⁶ The court stated that an Indiana court may enjoin a statutory scheme made exclusive where the scheme itself violates due process.⁸⁷ Thus, plaintiff had a state remedy sufficient to invoke the jurisdictional bar of the Tax Injunction Act.

In an unreported decision,⁸⁸ the United States District Court for the Southern District of Indiana ruled that the statutory procedure for review of assessment of the value of tangible personal property⁸⁹ as supplemented by standard appellate review provisions⁹⁰ provided “a plain, speedy and efficient remedy” for a taxpayer claiming denial of equal protection in personal property tax assessments.

C. Legislative Developments

During the survey period, thirty-eight public laws were enacted under title 6 of the Indiana Code. Thirty-one of the laws were enacted during the First Regular Session of the 100th General Assembly, and seven of the laws were passed during the Special Session of the 100th General Assembly on May 23, 1977. Although many of the new laws are of only narrow specialized interest,⁹¹ or

⁸⁴422 F. Supp. at 1026.

⁸⁵*Id.* at 1026 n.12 (citing *Davis v. Towe*, 379 F. Supp. 536 (E.D. Va. 1974); *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972)).

⁸⁶422 F. Supp. at 1026 (quoting *Bowles v. Heckman*, 224 Ind. 46, 55, 64 N.E.2d 660, 663 (1946)).

⁸⁷*Id.* at 1027.

⁸⁸*Sacks Brothers Loan Co. v. Cunningham*, No. IP 77-140-C (S.D. Ind. May 13, 1977).

⁸⁹IND. CODE § 6-1.1-15-1-13 (1976).

⁹⁰The final administrative determination by the State Board of Tax Commissioners is reviewable by the circuit or superior court of the county in which the property is located. *Id.* § 6-1.1-15-5. The decision of the circuit or superior court is reviewable by the Indiana Court of Appeals, IND. R. APP. P. 4, and, on transfer, by the Indiana Supreme Court, IND. R. APP. P. 11. Should there be a result adverse to the taxpayer in the highest state court and should federal constitutional issues be implicated in that result, resort may then be had in the United States Supreme Court by appeal or by certiorari, as the case may be. 28 U.S.C. § 1257(2), (3) (1970).

⁹¹E.g., IND. CODE § 6-1.1-36-7 (Supp. 1977) (State Board of Tax Commissioners may compromise the amount of property taxes, interest, and penalties assessed against a bankrupt railroad); *id.* § 6-5-8-7 (savings and loan association excise tax to be distributed on the basis of deposits to all taxing districts in which the association has offices); *id.* § 6-6-6.5-21 (aircraft excise tax collected in Allen County allocated to county board of aviation commissioners aviation fund); *id.* §§ 6-7-1-28.1 to -32.1 (cigarette tax distribution formula); *id.* § 6-9-1-5 (St. Joseph County hotel and tourist camp tax in-

are of no real significance to tax law in general,⁹² most of the new acts are comment worthy, either merely to alert the reader to their existence or to highlight the provisions of the new laws under their various subject matters.

Of general note, the legislature repealed the Multistate Tax Compact.⁹³ The intangibles tax law was recodified without substantive change in a new article 5.1 of title 6.⁹⁴ The County Adjusted Gross Income Tax Law was amended so as to provide a new levy limit on ad valorem property taxes for counties utilizing an adjusted gross income tax in the budget year when such tax is repealed.⁹⁵ The former requirement that a County Adjusted Gross Income Tax be effective for four full years before it could be rescinded was repealed and replaced by a new rescission procedure providing that such a tax may be rescinded in the first six calendar months of a year.⁹⁶ Now, in the year of rescission, calendar basis taxpayers are to pay one-half of the tax that would have been due for a full year, and fiscal year taxpayers are to pay a pro rata share of the tax that would have been due but for the rescission.⁹⁷ The retirement income credit against county adjusted gross income taxation was reworded to conform to the language of section 37 of the Internal Revenue Code.⁹⁸

The legislature also undertook a relatively comprehensive overhaul of the taxation and registration laws applicable to aircraft in Indiana.⁹⁹ One of the provisions of the 1977 Act made occasional sales of registered aircraft subject to the state sales tax.¹⁰⁰ A new valuation system based upon age and classification was enacted.¹⁰¹

creased to 5%); *id.* §§ 6-9-3-1, -4 (Clark, Floyd, Monroe, Knox, and Marion County hotel-motel taxes); *id.* §§ 6-1.1-19-1 to -2 (amending Pub. L. No. 47, § 1, 1975 Ind. Acts 385) (manner of computing school corporation property tax levies modified).

⁹²*E.g.*, IND. CODE §§ 9-7-5.5-1 to -10 (Supp. 1977) (personalized license plates); *id.* §§ 6-7-1-12, -28.1; 7.1-4-3-1 (excise taxes on cigarettes and liquor increased to help fund police and firemen's pension funds).

⁹³Pub. L. No. 90, § 1, 1977 Ind. Acts 467 (repealing IND. CODE §§ 6-8-9-101 to -1307 (1976)). The Supreme Court recently upheld the constitutionality of the Multistate Tax Compact under the compact clause, U.S. CONST. art. I, § 10, cl. 3; the commerce clause, *id.* § 8, cl. 3; and the fourteenth amendment, *id.* amend. XIV. *United States Steel Corp. v. Multistate Tax Comm'n*, 46 U.S.L.W. 4115 (U.S. Feb. 21, 1978), *aff'g*, 417 F. Supp. 795 (S.D.N.Y. 1976) (3-judge court).

⁹⁴IND. CODE §§ 6-5.1-1-1 to -9 (Supp. 1977) (previously codified at *id.* §§ 6-5-1-1 to -5-1 (1976)).

⁹⁵*Id.* §§ 6-3-3.1-1 to -5 (amending *id.* §§ 6-3.5-1-1 to -12 (1976)).

⁹⁶*Id.* §§ 6-3.5-1-6(a) (repealing *id.* § 6-3.5-1-6 (1976)).

⁹⁷*Id.* § 6-3.5-1-6(b), (c).

⁹⁸*Id.* § 6-3.5-1-2 (amending *id.* § 6-3.5-1-2 (1976)).

⁹⁹Pub. L. No. 87, 1977 Ind. Acts 438 (codified in scattered sections of IND. CODE §§ 6-6-6.5-, 6-2-1- (Supp. 1977)).

¹⁰⁰IND. CODE § 6-2-1-38(q) (Supp. 1977).

¹⁰¹*Id.* § 6-6-6.5-13.

The number of classes of aircraft was increased from two—piston-driven, and non-pressurized and other—to four.¹⁰² Also of general note is Public Law Number 82,¹⁰³ wherein the legislature engrafted provisions of the Adjusted Gross Income Tax Act¹⁰⁴—those dealing with auditing of returns, assessment and collection of tax liability, examination of taxpayer books and records, refunds, statutes of limitation, hearings, legal proceedings, maintenance of records by the Department of Revenue, and confidentiality of returns—onto the Occupation Income Tax Act.¹⁰⁵

1. *Death Taxes.*—Only one bill was enacted into law during the survey period that directly affects state death taxation.¹⁰⁶ Although much of the new law worked mere technical, language-oriented changes on previously existing statutes,¹⁰⁷ several of the sections enacted substantive changes in the law worthy of a deeper canvass. The inheritance tax exemption for property interests transferred to a surviving spouse was increased from \$15,000 to \$60,000,¹⁰⁸ while the inheritance tax rates for property transferred to Class B and C transferees were increased.¹⁰⁹ The new law also extended to county assessors the power to consent to the transfer of personal property belonging to a resident decedent.¹¹⁰ Formerly, that power rested exclusively with the Department of Revenue.¹¹¹ The same section of the law mandates the Department of Revenue to notify the county assessor of the county in which a resident decedent dies of any consent to transfer that it issues.¹¹² The safety box inventory statute was streamlined by one section of the new law;¹¹³ the same section also added a new provision requiring life insurance companies to notify the Department of Revenue within ten days after life insurance proceeds are paid to a resident decedent's estate.¹¹⁴ The new law also relieved personal representatives of the requirement of at-

¹⁰²Id. § 6-6-6.5-13(a) The new classes are: (A) Piston-driven, (B) Piston-driven, and Pressurized, (C) Turbine driven or other powered, and (D) Home-built, Gliders, or Hot Air Balloons.

¹⁰³Pub. L. No. 82, 1977 Ind. Acts 413 (codified at IND. CODE §§ 6-3.5-3-11.5, -14 (Supp. 1977)).

¹⁰⁴IND. CODE §§ 6-3-1-1 to -7-3 (1976).

¹⁰⁵Id. § 6-3.5-3-11.5 (Supp. 1977) (amending *id.* §§ 6-3.5-3-1 to -13 (1976)).

¹⁰⁶Pub. L. No. 6, 1977 Ind. Acts 87 (Special Sess.) (codified in scattered sections of IND. CODE § 6-4.1- (Supp. 1977)).

¹⁰⁷E.g., IND. CODE §§ 6-4.1-1-4, -4-1, -4-7, -12-1 (Supp. 1977).

¹⁰⁸Id. § 6-4.1-3-8.

¹⁰⁹Id. § 6-4.1-5-1(c), (d).

¹¹⁰Id. § 6-4.1-8-4(a), (b).

¹¹¹See, *id.* § 6-4.1-8-4 (1976) (amended 1977).

¹¹²Id. § 6-4.1-8-4(d) (Supp. 1977).

¹¹³Id. § 6-4.1-8-5(a), (c) (amending *id.* § 6-4.1-8-5 (1976)).

¹¹⁴Id. § 6-4.1-8-5(b).

taching an inheritance tax receipt to their final report before approval of final accounting and discharge for personal tax liability in cases where the probate court having jurisdiction over the estate finds that no inheritance tax return statement is needed.¹¹⁵

2. *Gross Income Tax and Adjusted Gross Income Tax.*—The Adjusted Gross Income Tax Act was amended to permit a deduction for individual taxpayers for the amount of income taxes paid to political subdivisions of other states.¹¹⁶ Military retirement income will receive new adjusted gross income tax treatment under a new deduction or credit alternative. The first \$2,000 of an individual's or surviving spouse's income received on account of military service may be deducted from adjusted gross income provided that the taxpayer is sixty years old on the last day of the applicable tax year.¹¹⁷ The alternative to the deduction is found in the newly restated retirement income credit against the adjusted gross income tax.¹¹⁸ The new statute incorporates the retirement income credit found in section 37 of the Internal Revenue Code and allows a credit equal to the lesser of two-fifteenths of the federal credit or the remainder of total adjusted gross income taxes less the credit allowable for taxes paid to other states. The new military retirement income deductions are not available to a taxpayer who opts for the general retirement income credit against the adjusted gross income tax referred to above.¹¹⁹ Taxpayers over sixty-two years of age who receive federal civil service annuities were also extended an adjusted gross income tax deduction by the 1977 General Assembly. The deduction is equal to the remainder of the first \$2,000 of federal civil service annuities received and includable in gross income for federal income tax purposes under section 62 of the Internal Revenue Code less the total amount of social security and railroad retirement benefits received.¹²⁰ The deduction is unavailable to taxpayers who utilize the general retirement income credit against the adjusted gross income tax.¹²¹

The definition of "gross income"¹²² was altered by the legislature in several narrow aspects.¹²³ Perhaps the most significant of the

¹¹⁵*Id.* § 6-4.1-9-13.

¹¹⁶*Id.* § 6-3-1-3.5(a)(5) (amending *id.* §§ 6-3-1-1 to -7-3 (1976)).

¹¹⁷*Id.* § 6-3-2-4. A repealed statute, ch. 355, § 1, 1967 Ind. Acts 1327 (repealed 1977), provided that the Adjusted Gross Income Tax Act did not apply to the first \$2,000 of compensation received for military service in much the same fashion as the new military retirement income deduction.

¹¹⁸IND. CODE § 6-3-3-4.1 (Supp. 1977).

¹¹⁹*Id.* § 6-3-2-4.

¹²⁰*Id.* § 6-3-2-3.7.

¹²¹*Id.*

¹²²*Id.* § 6-2-1-1 (1976) (amended 1977).

¹²³*Id.* § 6-2-1-1 (Supp. 1977).

definitional changes is the provision that excludes the following from gross income:

the gross receipt represented by the value of stocks, bonds, or other securities received in a reciprocal exchange by and between the owners thereof of substantially all of the assets of another corporation, where such exchange is made in the course of a consolidation, merger, or other reorganization and the stocks, bonds, or other securities received in exchange are issued by one (1) or more corporations or associations, each of which is a party to the reorganization.¹²⁴

Also, excluded from gross income for real estate brokers is that part of a commission paid to a cooperating or associated broker or an associated salesperson within five days of the receipt of the gross commission.¹²⁵

The definition of "adjusted gross income" was altered in two particulars by the 1977 General Assembly. For individuals, adjusted gross income for purposes of the Indiana tax now means adjusted gross income as defined in section 62 of the Internal Revenue Code but with some modifications added on by the state statute. The modifications added require the individual taxpayer to: (1) add to his adjusted federal gross income an amount equal to the total of the ordinary income portion of a lump sum distribution from a qualified pension plan under the provisions of section 402(e)(4)(A) of the Internal Revenue Code if that lump sum distribution is subject to tax under section 402(e), and (2) subtract from federal adjusted gross income any amounts that were included in that sum as recovery of items previously deducted as an itemized bad debt, prior tax, or delinquency deduction¹²⁶ from federal adjusted gross income.¹²⁷

3. *Property Taxes.*—During the 1977 Special Session, Public Law Number 5¹²⁸ was enacted, which rewrote much of the law concerning ad valorem property tax levy limits. The Boy Scouts and the Girl Scouts were added to the groups exempt from tangible personal property tax under Indiana Code section 6-1.1-10-25.¹²⁹ The property tax assessment date for mobile homes was changed from March 1 to January 15,¹³⁰ and sellers of mobile homes will, effective January 1, 1978, be required to provide the buyer with the property tax

¹²⁴Id. § 6-2-1-1(m).

¹²⁵Id.

¹²⁶I.R.C. § 111.

¹²⁷IND. CODE § 6-3-1-3.5 (Supp. 1977) (amending *id.* § 6-3-1-3.5 (1976)).

¹²⁸Pub. L. No. 5, 1977 Ind. Acts 67 (Special Sess.) (codified in scattered sections of IND. CODE § 6-3.5-1- (Supp. 1977)).

¹²⁹IND. CODE § 6-1.1-10-25(a)(11), (12) (Supp. 1977).

¹³⁰Id. § 6-1.1-1-2(2).

clearance permit, which the buyer must have to effect a transfer of title.¹³¹

Formerly, township assessors were required to examine the personal property, books, and records of persons who failed to file required personal property tax returns.¹³² Under a new enactment, the assessors have the discretion to make the examinations previously noted, and as an alternative to the examination procedure, the assessors may now estimate the value of personal property held by a delinquent taxpayer and issue a notice based on the estimate, to which the taxpayer may respond by filing a late return.¹³³ While the assessors were given some leeway in their duties by the aforementioned act, another act of the 1977 General Assembly imposed upon the assessors the requirement of competitive bidding before a professional appraiser may be selected to assist with reassessment.¹³⁴ The new provision does, however, extend the time within which the assessor must mail notice to taxpayers of reassessed valuations from thirty to ninety days. The enactment also requires the county board of review to process petitions for reassessment within ninety days of receipt.

The property tax deduction for rehabilitated residential property was increased and extended by the 1977 General Assembly.¹³⁵ Owners of rehabilitated residential property may now deduct the lesser of (1) the total increase in assessed valuation resulting from the rehabilitation or (2) \$3,000 per rehabilitated dwelling unit from the assessed value if increased by reason of the rehabilitation.¹³⁶ The new enactment requires assessing officials to notify owners of reassessments occasioned by rehabilitation and of the property tax deductions available to owners of rehabilitated property.¹³⁷ The maximum assessed value limitations for property to qualify for this deduction were likewise increased.¹³⁸

A special property tax deduction for rehabilitation or redevelopment of real property in urban development areas was added by the 1977 General Assembly.¹³⁹ The enactment authorizes the commissioners of the department of redevelopment of a consolidated first class city (Indianapolis), or a second class city, to establish urban

¹³¹*Id.* § 6-1.1-7-10.4. The act also imposes a \$100.00 fine on sellers who do not provide the clearance permit.

¹³²*Id.* § 6-1.1-3-15 (1976) (amended 1977).

¹³³*Id.* § 6-1.1-3-15 (Supp. 1977).

¹³⁴*Id.* § 6-1.1-4-18.

¹³⁵*Id.* § 6-1.1-12-18 (amending *id.* § 6-1.1-12-18 (1976)).

¹³⁶*Id.* § 6-1.1-12-18(a)(1), (2).

¹³⁷*Id.* § 6-1.1-12-21.

¹³⁸*Id.* § 6-1.1-12-18(d).

¹³⁹*Id.* §§ 6-1.1-12.1-1 to -6.

development areas pursuant to statutory procedures applicable in other legal areas,¹⁴⁰ and extends a five-year property tax deduction based on the increase in assessed valuation caused by rehabilitation or redevelopment of real property located in the designated area.¹⁴¹

The 1977 General Assembly removed the \$2,000 limit on the property tax deduction for solar heating or cooling units and extended the scope of the deduction to include mobile homes.¹⁴² The same enactment mandated the State Board of Tax Commissioners to promulgate rules and regulations for determining the value of such systems.

4. *Tax Procedure.*—The 1977 General Assembly worked a number of procedural changes in Indiana tax law. Most of the procedural changes implemented during the survey period are technical in nature and are worthy of passing comment, although some of the enactments may have significant impact on state tax law practices.

In cases where notice is required to be given to a taxpayer of official action regarding the assessment of tangible personal property, that notice must, under a new enactment, inform the taxpayer of (1) his opportunity for review of the assessment, and (2) the procedures which must be followed in order to secure the review.¹⁴³ Upon such review, under Indiana Code section 6-1.1-15-2,¹⁴⁴ the county board of review must list in writing the reasons upon which its final determination is based. When the county board of review is required to give a taxpayer notice of its action regarding the assessment of tangible personal property, the same principles of informing him of the opportunity for review and the procedures that must be followed in order to obtain review of the assessment decision as are applicable to the initial action apply.¹⁴⁵ Likewise, the State Board of Tax Commissioners must, upon its determination with regard to such assessments, inform the taxpayer of the reasons for its decision and the manner by which judicial review may be obtained.¹⁴⁶

The legislature also worked numerous changes in deadlines, fees, and notices under the property tax laws. The earliest date upon which a county treasurer may now send written demands for delinquent personal property taxes is November 10.¹⁴⁷ The fee for making such demand was raised from \$1 to \$3.¹⁴⁸ The charge for selling

¹⁴⁰*Id.* § 6-1.1-12.1-2.

¹⁴¹*Id.* §§ 6-1.1-12.1-3 to -4.

¹⁴²*Id.* § 6-1.1-12-26(a) (amending *id.* § 6-1.1-12-26 (1976)).

¹⁴³*Id.* § 6-1.1-15-1.

¹⁴⁴*Id.* § 6-1.1-15-2.

¹⁴⁵*Id.* § 6-1.1-15-3(a).

¹⁴⁶*Id.* § 6-1.1-15-4(a).

¹⁴⁷*Id.* § 6-1.1-23-1. Formerly, the first day upon which such notices could be sent was after the first Monday in November. *Id.* § 6-1.1-23-1 (1976) (amended 1977).

¹⁴⁸*Id.* § 6-1.1-23-7(a)(1) (Supp. 1977).

real property in satisfaction of delinquent property taxes or special assessments was increased from \$5 to 10.¹⁴⁹ That \$10 charge along with all delinquent property taxes and special assessments on the real property involved must be paid before a tax sale of the property may be avoided.¹⁵⁰ If, however, the delinquent taxes and special assessment are paid before the first publication of the notice of sale, then the owner-taxpayer is not required to pay the \$10 charge.¹⁵¹ If such notice is published, the county auditor must now include in it a statement of the approximate location of each parcel of realty eligible for sale.¹⁵²

Two procedural changes were worked in the intangibles tax law. A taxpayer who uses a fiscal year for income tax purposes may use the same reporting period for his intangibles tax return.¹⁵³ The former lien provisions of the intangibles tax law were eliminated and replaced by a new lien procedure similar to that applicable to the adjusted gross income tax.¹⁵⁴

Several technical changes were effected by the legislature regarding state income tax procedure. Quarterly returns are now required only for taxpayers whose tax for any particular quarter exceeds \$250.¹⁵⁵ The interest rate applicable to late returns or refunds was raised to eight percent from six percent.¹⁵⁶

Separate state returns are now required of husband and wife taxpayers when they file separate federal income tax returns.¹⁵⁷ Declarations of estimated tax for those taxpayers with income not subject to withholding are now required where that amount of income not subject to withholding exceeds \$5,000. Formerly, the minimum was \$2,000. That declaration requirement is inapplicable in cases where the estimated tax liability can be reasonably expected to be less than \$100.

Nonresident individual and resident corporate taxpayers must, effective January 1, 1978, notify the Department of State Revenue of any modifications of federal income tax returns or liability within 120 days of the modification.¹⁵⁸

The twenty-five percent omission rule¹⁵⁹ applicable to federal in-

¹⁴⁹*Id.* § 6-1.1-24-2(3)(iv).

¹⁵⁰*Id.* § 6-1.1-24-5(d).

¹⁵¹*Id.*

¹⁵²*Id.* § 6-1.1-24-2.1.

¹⁵³*Id.* § 6-5.1-6-1(b)(2).

¹⁵⁴*Id.* § 6-5.1-9-5 (amending Pub. L. No. 84, § 1, 1977 Ind. Acts 416).

¹⁵⁵*Id.* § 6-2-1-15(b). Formerly, quarterly returns were required when the tax liability for a quarter exceeded \$25. *Id.* § 6-2-1-15(b) (1976) (amended 1977).

¹⁵⁶*Id.* §§ 6-2-1-15(d), -16(b) (Supp. 1977).

¹⁵⁷*Id.* § 6-3-4-2(e).

¹⁵⁸*Id.* § 6-3-4-6.

¹⁵⁹I.R.C. § 6501(e)(1)(A).

come tax is now a part of state tax practice. By the new statute, the standard three-year statute of limitations does not apply when a taxpayer omits an amount properly includible in his gross income that is in excess of twenty-five percent of the amount of gross income stated in the return.¹⁶⁰ In such cases, a six-year statute of limitations applies.¹⁶¹

In what could prove to be a very significant enactment, inasmuch as the gross income tax regulations are often altered, the 1977 General Assembly placed an effective restriction on the applicability of gross income tax regulations. Beginning on May 26, 1977, all changes in the interpretations of the gross income tax law by the Department of Revenue that could increase a taxpayer's liability under the gross income tax law must be stated in rules or regulations duly promulgated in the manner by which other state administrative agencies must proceed.¹⁶² Furthermore, changes in departmental interpretation of the gross income tax law that could result in an increase of a taxpayer's gross income liability may in no event take effect prior to the date on which such change is duly promulgated in a rule or regulation.¹⁶³

XVII. Torts

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As has been the case for the past few years, the most dramatic developments in the law of torts have taken place in the products liability area. Those developments are thoroughly discussed in a recent symposium in the *Indiana Law Review*¹ and in another article in this Survey. The purpose of this review is to discuss the "traditional" tort cases decided during the survey period that are of interest to the practitioner and the scholar, either because of their

¹⁶⁰IND. CODE § 6-3-6-2(a) (Supp. 1977) (amending *id.* § 6-3-6-2 (1976)).

¹⁶¹*Id.*

¹⁶²*Id.* § 6-2-1-34(d). Rules and regulations are "duly promulgated" when the procedure outlined in *id.* §§ 4-22-2-1 to -11 (1976) is followed.

¹⁶³*Id.* § 6-2-1-34(d) (Supp. 1977).

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¹See generally Symposium: 1977 Products Liability Institute, 10 IND. L. REV. 753 (1977).

treatment of an area of the law or because of their treatment of particular facts. This is not meant to be an exhaustive review of all torts cases decided during the survey period, but rather a collection of the cases the authors believed were most significant.

A. *Intentional Torts*

In *Mitchell v. Drake*,² the Third District Court of Appeals held that a police officer was not liable for false imprisonment of the plaintiff, who was acquitted of disorderly conduct charges when the trial court held that Indiana's disorderly conduct statute³ was unconstitutional.⁴ Following *Saloom v. Holder*,⁵ the court stated that the constitutionality of legislative pronouncements is presumed, and therefore, police officers acting in good faith in reliance on such pronouncements are protected from liability for arrests made, even if the statutes are subsequently found to be invalid.⁶

Two defamation cases decided during the survey period are helpful in determining where Indiana stands on issues of privilege and malice. The plaintiff and defendant in *Weenig v. Wood*⁷ were business associates in Markway Press, Inc., a corporation that printed brochures for distribution to hospitals. The plaintiff was a shareholder, director, and employee of the corporation, while the defendant was the president and a director. The plaintiff, Wood, designed the brochures and sold them through his own business, variously known as Guideways or Mark Wood Associates. It was Wood's practice to deposit checks made payable to his business in checking accounts throughout the country and to allocate forty percent of the proceeds to his own business and sixty percent to Markway Press. Weenig, the defendant, had agreed to manage and invest in Markway Press in exchange for a controlling interest in the company; in turn, Wood was to continue to operate his businesses and to market the brochures printed by Markway. Shortly after becoming president of the company, Weenig accused Wood of embezzling funds from the company. The first accusation occurred at a board of directors' meeting of the company and was repeated on at least eight other occasions to groups other than the board of

²360 N.E.2d 195 (Ind. Ct. App. 1977).

³IND. CODE § 35-27-2-1 (1976) (repealed 1977, Pub. L. No. 148, § 24, 1976 Ind. Acts 718).

⁴The court of appeals commented in a footnote that the same statute was found to be constitutional in *Hess v. State*, 260 Ind. 427, 297 N.E.2d 413 (1973), shortly after the dismissal of charges against Mitchell. 360 N.E.2d at 196 n.1.

⁵158 Ind. App. 622, 304 N.E.2d 217 (1973).

⁶360 N.E.2d at 197.

⁷349 N.E.2d 235 (Ind. Ct. App. 1976).

directors.⁸ As a result of the accusations, Wood left the company.

Wood sued Weenig for defamation, and a jury awarded him \$150,000 actual damages and \$50,000 punitive damages. The trial judge reduced the recovery to \$25,000 actual damages and \$5,000 punitive damages.⁹ Both parties appealed. The court of appeals was presented with issues of privilege, malice, and damages, as well as various procedural questions that will not be discussed here. The court first found that the accusation that Wood had embezzled funds was defamatory *per se* in two ways: it "imputed to Wood the commission of a crime," and it "impugned Plaintiff in his trade or business."¹⁰

The court then addressed the issue of whether Weenig was protected by a qualified privilege for communications in the common interest. As the court noted, it is the rule in Indiana that:

[A] communication made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged.¹¹

The accusations made by Weenig during the board of directors' meeting were held to be within the privilege, but other statements made to people not involved in the business were not privileged. The court then found that Weenig abused and therefore lost the privilege on the privileged occasions¹² by actions that constituted malice by publication of the defamation. Weenig's obvious personal ill will toward the plaintiff coupled with his "vehemence" of language were evidence of actual malice.¹³ Reasoning that the existence of actual malice overcomes the qualified privilege, the court of appeals found that all the occasions on which Weenig made the accusations were actionable.¹⁴

⁸*Id.* at 238.

⁹*Id.*

¹⁰*Id.* at 246. When defamation *per se* is found, absent proof that defendant knew of the falsity of the communication or acted in reckless disregard for its truth or falsity, the common law rule of presumed damages is inapplicable. When the defendant's negligence is at issue, recovery is limited to compensation for actual injury. *RESTATEMENT (SECOND) OF TORTS* § 621 (1977).

¹¹349 N.E.2d at 248 (quoting 18 IND. L. *ENCYCLOPEDIA Libel and Slander* § 52 (1959), cited in *Indianapolis Horse Patrol, Inc., v. Ward*, 247 Ind. 519, 524, 217 N.E.2d 626, 628-29 (1966)).

¹²349 N.E.2d at 248.

¹³*Id.* at 250.

¹⁴*Id.* at 249.

The court found that in addition to the showing of personal ill will, there was another basis for finding actual malice on Weenig's part. If Weenig had made any effort to verify his accusations before making them, he would have discovered, based on Wood's total disclosure of financial affairs, that Wood had never withdrawn more than his allocated portion of the checking accounts. Therefore, Wood was only taking money that was rightfully his. The court stated: "Such recklessness hardly comports with the requirement of 'good faith' included in Weenig's own statement of the conditional privilege which he claims protects him."¹⁶

The court of appeals held that the original verdict of the jury was supported by ample evidence, as to both actual and punitive damages. The court remanded the case to the trial court with orders to reinstate the original jury verdict.¹⁷

The second defamation case, *Patten v. Smith*,¹⁸ gave guidance as to the appropriate jury instructions to be given in cases where malice or reckless disregard of falsehood are at issue. The case involved a defamation suit by a mausoleum builder against the defendant, who mailed a brochure containing warnings and advice as to mausoleum purchase and construction to local residents during the construction of the structure. The trial court gave instructions stating that a qualified privilege was applicable to defendant's comments if the subject matter was of public interest, and that "the plaintiff Richard Smith cannot recover actual or punitive damages unless he proves by evidence of convincing clarity that there was actual malice by the defendant Maurice Patten."¹⁹ The court relied on the definition of actual malice in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,²⁰ which requires "the private individual who brings a libel action involving an event of general or public interest to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false."²¹ The court rejected, however, defendant's tendered instruction, which defined the term "reckless disregard" as follows:

I instruct you that to establish that the defendant, Maurice Patten, or the defendants published the pamphlets with reckless disregard, the plaintiff, Richard Smith, must show

¹⁶*Id.* at 251.

¹⁷*Id.* at 257-58.

¹⁸360 N.E.2d 233 (Ind. Ct. App. 1977).

¹⁹*Id.* at 237.

²⁰321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

²¹360 N.E.2d at 237 (quoting *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d at 586).

by clear and convincing evidence that the defendant, Maurice Patten, in fact entertained serious doubts as to the truth of his publication. If you find from the evidence that Maurice Patten had reason to believe the truth of the matters contained in such pamphlet the fact that he did not verify the truth of the statements contained therein does not constitute reckless disregard.²¹

The Third District Court of Appeals reiterated its holding in *Aafco* and expressly approved the defendant's instruction, stating that in cases in which reckless disregard is an issue, the term must be defined for the jury. In addition, the court found it was erroneous for the trial court to give an instruction defining malice with an exact quote from *Black's Law Dictionary*, because "malice is a term of art in cases involving qualified privilege."²² Holding that the *Aafco* definition is the proper one for such cases, the court found that the omission of the reckless disregard instruction and the inclusion of the incorrect malice definition were reversible errors and grounds for a new trial.²³

B. Negligence

1. *Statutory Negligence*.—Several cases during the survey period involved various kinds of statutory negligence. In *Smith v. Cook*,²⁴ the First District Court of Appeals held that the Indiana Manual on Uniform Traffic Devices for Streets and Highways,²⁵ which was adopted by statute in Indiana to guide the "signing, marking, and erection of all traffic control devices on all streets and highways,"²⁶ did not in itself impose an absolute duty on those bound to follow it. The Manual, rather, was held to be "but a guide."²⁷ Therefore, failure to follow its provisions could not be negligence per se. In the case at hand, the plaintiff failed to sustain the burden of proof as to defendant's negligence, and the granting of judgment on the evidence was held to be proper.²⁸

²¹*Id.* at 237.

²²*Id.* at 238.

²³*Id.*

²⁴361 N.E.2d 197 (Ind. Ct. App. 1977).

²⁵Indiana State Highway Commission, Indiana Manual on Uniform Traffic Devices for Streets and Highways (1975) (unpublished pamphlet available at Commission offices, 100 N. Senate Ave., Indianapolis, Indiana 46204).

²⁶IND. CODE § 9-4-2-1 (1976). The statute provides: "The Indiana Manual on Uniform Traffic Control Devices for Streets and Highways shall be adhered to by all governmental agencies within the state responsible for the signing, marking, and erection of all traffic control devices on all streets and highways within the state."

²⁷361 N.E.2d at 201. The court noted that the Manual made the use of many devices discretionary and was even called a guide in the Introduction. *Id.*

²⁸*Id.* at 202.

In *Stevens v. Norfolk & Western Railway*,²⁹ the First District Court of Appeals held that a jury may find a railroad crossing is extra hazardous, even if the Indiana Public Service Commission has not so designated the crossing.³⁰ Indiana Code section 8-6-7-1³¹ provides that the Public Service Commission may declare railroad crossings to be dangerous or extra hazardous and thereby require installation of crossing safety devices. The Commission had not designated the crossing in *Stevens* as an extra-hazardous one, and in granting partial summary judgment, the trial court found that "as a matter of law the defendant was not required to install any automatic train-activated warning signal or crossing safety device other than those prescribed by statute."³² Tracing what it called the "departure from strict adherence to the so-called 'minority view,'"³³ the court of appeals found that it is the law in Indiana that:

[O]nce it is determined under all the circumstances that a grade crossing is extra hazardous, [the railroad] can then be found negligent in its failure to adequately protect the public from danger by providing warnings and taking safety precautions in addition to those required by statute, and despite the absence of a Public Service Commission determination that the crossing is extra hazardous.³⁴

The court then remanded the case to the trial court because the defendant railroad had not sustained its burden of proof on the partial summary judgment motion.

2. *Privileges and Immunities*.—In *Salem Bank & Trust Co. v. Whitcomb*,³⁵ the plaintiff-bank sought to recover from the Indiana Secretary of State, the Director of the Uniform Commercial Code Division, and their sureties for failing to include a copy of a financing statement in the results of a U.C.C. filing search³⁶ pertaining to a

²⁹357 N.E.2d 1 (Ind. Ct. App. 1976). The First District Court of Appeals reiterated its holding in *Wells v. Baltimore & Ohio R.R.*, 363 N.E.2d 1001 (Ind. Ct. App. 1977).

³⁰357 N.E.2d at 4-5.

³¹IND. CODE § 8-6-7-1 (1976).

³²357 N.E.2d at 2 (quoting the trial court).

³³*Id.* at 3.

³⁴*Id.* at 4. The defendant-railroad had relied on two cases to support its contention that it is not proper for a jury to decide whether a railroad crossing has become extra hazardous. *Tyler v. Chicago & E. Ill. Ry.*, 241 Ind. 463, 173 N.E.2d 314 (1961); *Terre Haute, Indpls. & E. Traction Co. v. Phillips*, 191 Ind. 374, 132 N.E. 740 (1921). The court of appeals agreed that those cases supported defendant's proposition, but noted that Indiana had departed from that rule in *Central Ind. Ry. v. Anderson Banking Co.*, 252 Ind. 270, 247 N.E.2d 208 (1969), and had since then followed the majority rule: a jury might determine a crossing to be extra hazardous.

³⁵362 N.E.2d 1180 (Ind. Ct. App. 1977).

³⁶The Indiana Secretary of State's office is required to certify such information by IND. CODE § 26-1-9-407(2) (1976), which provides:

party to whom the bank was considering loaning money. The prior secured party, whose identity was omitted from the information given the bank by the Secretary of State's office, repossessed the collateral of the debtor and the bank was left with no recourse on its \$18,000 loan balance. The Secretary of State asserted that bad faith or malice must be shown in the performance of ministerial duties before a public officer may be found liable for negligence. The trial court agreed and granted judgment in favor of the defendants. The Indiana Court of Appeals disagreed and held that the law in Indiana rests upon "the traditional distinction between ministerial and discretionary acts as they relate to the immunity accorded executive officers."³⁷ Although a public officer may not be held liable for errors made in the performance of discretionary acts, he may be held accountable for negligence in the performance of merely ministerial acts.³⁸ The court of appeals remanded the case to the trial court for exploration of factual controversies not examined in the prior proceeding.

One additional immunity case that could prove to be a landmark decision if it is upheld by the United States Supreme Court is *Sparkman v. McFarlin*.³⁹ The seventeen-year-old plaintiff brought an action under federal civil rights statutes⁴⁰ against her mother, her mother's attorney, and an Indiana circuit court judge, based on the judge's granting of the mother's request two years earlier to have the minor plaintiff sterilized. The judge granted the mother's petition, which alleged that the plaintiff was "somewhat retarded" but was not behind children of her age group, that she had been dating and staying overnight with older men, and that the mother "could not maintain a continuous observation over [plaintiff] to 'prevent unfortunate circumstances.'"⁴¹ The judge granted the petition without a hearing and with no notice to the plaintiff; no guardian ad litem was appointed. Furthermore, the petition and order were never even filed in the court's records. The plaintiff was sterilized by tubal

Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein.

³⁷362 N.E.2d at 1182.

³⁸*Id.* at 1182-83. The court cited *Wallace v. Feehan*, 206 Ind. 522, 537-38, 190 N.E. 438, 445 (1934) (quoting F. HARPER, A TREATISE ON THE LAW OF TORTS § 298, at 669-70 (1933)), for an explanation of the distinction between ministerial and discretionary acts.

³⁹552 F.2d 172 (7th Cir.), *cert. granted sub nom. Stump v. Sparkman*, 98 S. Ct. 51 (1977) (No. 76-1750).

⁴⁰42 U.S.C. §§ 1983, 1985(3) (1970).

⁴¹552 F.2d at 173.

ligation at a county hospital, but she was told the surgery was to remove her appendix. She did not learn of the sterilization until after she married, when one of the doctors who performed the surgery told her about it.

She and her husband brought suit in federal district court, alleging her constitutional rights had been violated; she also asserted pendent state claims of assault and battery and medical malpractice, and her husband claimed damages for loss of potential fatherhood.⁴² The federal district court found that the judge was "clothed with absolute judicial immunity" for his actions, and since the judge's actions constituted the only state action present, the federal claims could not stand.⁴³ The court dismissed the federal claims on that basis; the state claims were dismissed for lack of subject matter jurisdiction. The Seventh Circuit Court of Appeals reversed the district court, holding that judicial immunity was not meant to extend so far.

The court first discussed the rationale of the doctrine of judicial immunity:

The doctrine of judicial immunity was adopted by the Supreme Court in *Bradley v. Fisher* and was held applicable to actions brought under 42 U.S.C. § 1983 in *Pierson v. Ray*. Its purpose is to permit judges to exercise their judicial function independently, without fear of civil liability. It is available even where malicious or corrupt action on the part of a judge is alleged.⁴⁴

Although the immunity is of wide scope, the court stated that it applies only when the judge has subject matter jurisdiction—that is, "the power of the court to hear and decide a cause of action before it."⁴⁵ The Seventh Circuit held that the judge in this case acted completely without a statutory or common law basis on which to rely. The court examined Indiana law at the time the petition for sterilization was granted, and found that there was no authority for ordering such a procedure either in Indiana statutes or in the common law. Having so determined, the court then stated that the only other possible justification was that the remedy was a "valid exercise of the power of courts to fashion new common law."⁴⁶ The court

⁴²*Id.* at 173-74.

⁴³*Id.* at 174.

⁴⁴*Id.* (citing *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871)) (citations omitted). The Seventh Circuit later followed *Pierson* in defining judicial immunity: "Judges are immune from liabilities under suits arising from acts performed within the scope of their judicial duties." *Holton v. Boman*, 493 F.2d 1176, 1178 (7th Cir. 1974) (citing *Pierson v. Ray*, 386 U.S. at 554).

⁴⁵552 F.2d at 174.

⁴⁶*Id.* at 175-76.

determined that there was no such valid exercise in this case, and to advocate judicial actions of the sort would be to sanction "tyranny from the bench."⁴⁷

Finally, the court noted that even if the judge had been within the scope of his powers in fashioning a new remedy, he was not entitled to protection because he had failed "to comply with elementary principles of procedural due process."⁴⁸ The court went on to state, "This kind of purported justice does not fall within the categories of cases at law or in equity."⁴⁹

Having concluded the doctrine of judicial immunity did not protect the judge's actions, the Seventh Circuit remanded the case to the district court. The United States Supreme Court granted certiorari on October 3, 1977.⁵⁰ Hopefully, the Court will not reverse the Seventh Circuit's sound reasoning and thereby place its stamp of approval on such irresponsible conduct by a judicial officer.

3. *Duty.*—The plaintiff in *Petroski v. Northern Indiana Public Service Co.*,⁵¹ a fourteen-year-old boy, climbed a tree that was frequently played in by children in his neighborhood. He was injured when he touched a live, uninsulated electric wire running above a similar wire that carried no electric charge. The evidence showed that the Northern Indiana Public Service Co. (NIPSCO) knew or should have known that children frequently played in the tree. The trial court granted judgment on the evidence in favor of NIPSCO. The Third District Court of Appeals reversed, holding that NIPSCO owed a common law duty to the plaintiff and that the issue of whether there had been a breach of that duty should have been presented to the jury.

The court first stated the general rule that "[i]n Indiana, companies engaged in the generation and distribution of electricity have a duty to exercise reasonable care to keep distribution and transmission lines safely insulated in places where the general public may come into contact with them."⁵² It then concluded that, given the evidence that children had played in the tree for several years, and regardless whether the plaintiff was characterized as a trespasser or a licensee, NIPSCO owed him "a duty to exercise reasonable care

⁴⁷*Id.* at 176.

⁴⁸*Id.* In contrast, a federal district court recently found that, under the circumstances, a summary procedure ordering a child removed from his parents' custody and appointing a guardian to give permission for a possibly lifesaving blood transfusion was within the judge's jurisdiction; the court thereby distinguished *Sparkman v. Staelens*, 432 F. Supp. 834, 837 (N.D. Ill. 1977).

⁴⁹552 F.2d at 176.

⁵⁰98 S. Ct. 51 (1977) (No. 76-1750).

⁵¹354 N.E.2d 736 (Ind. Ct. App. 1976).

⁵²*Id.* at 741.

to protect him from coming into contact with its high voltage wires."⁵³

C. Defenses

1. *Seat Belt Defense.*—There is still a theoretical possibility that a defendant in Indiana could partially or totally escape liability in an automobile accident based on the plaintiff's failure to wear a seat belt. However, as the number of cases increases in which courts of appeal refuse to apply such a defense, the likelihood of its success decreases.

Both the First District Court of Appeals, in *Gibson v. Henninger*,⁵⁴ and the Second District Court of Appeals, in *Rhinebarger v. Mummert*,⁵⁵ considered seat belt cases during the survey period. Both courts held that giving an instruction allowing the jury to find that the plaintiff had been contributorily negligent in failing to use available seat belts was contrary to law.⁵⁶

In 1971, the Seventh Circuit Court of Appeals, making an attempt to predict Indiana's position regarding the seat belt defense, held that giving such an instruction was not in error.⁵⁷ Both the *Gibson* and *Rhinebarger* courts refused to follow the federal interpretation of Indiana law⁵⁸ and, instead, followed *Kavanagh v. Butorac*,⁵⁹ an earlier Indiana case. Although *Kavanagh* did leave the door open for the application of the defense in some later case,⁶⁰ the defendant did not succeed there.

⁵³*Id.* at 742. The court also considered the standard of care applicable to the plaintiff and concluded that he had not acted any differently from any normal fourteen-year-old.

⁵⁴350 N.E.2d 631 (Ind. Ct. App. 1976).

⁵⁵362 N.E.2d 184 (Ind. Ct. App. 1977).

⁵⁶In *Gibson*, the issue was whether the trial court erred in not giving the defendant's instruction. The court held it did not. 350 N.E.2d at 634. On the other hand, in *Rhinebarger*, the trial court gave the instruction and the court of appeals held it to be reversible error. 362 N.E.2d at 185.

⁵⁷*Mays v. Dealers Transit, Inc.*, 441 F.2d 1344 (7th Cir. 1971).

⁵⁸*Gibson v. Henninger*, 350 N.E.2d at 632; *Rhinebarger v. Mummert*, 362 N.E.2d at 186 & n.1 (Buchanan, P.J., concurring).

⁵⁹140 Ind. App. 139, 221 N.E.2d 824 (1966).

⁶⁰The *Kavanagh* court said: "We recognize [the] possibility of the doctrine [of avoidable consequences] applying in some future date . . ." *Id.* at 149, 221 N.E.2d at 830.

The defense is based on the theory that the plaintiff could have avoided some or all of his injuries by wearing a seat belt. However, the failure to wear the seat belt could almost never be the cause in fact of the accident itself. See the discussion of the seat belt defense in Twerski, *The Use and Abuse of Comparative Negligence in Products Liability, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 797 820-23 (1977).

In arguing the doctrine of avoidable consequences, the defendant must take care to avoid seeming to argue comparative negligence, the basis upon which the court re-

According to these cases, in order for a defendant to be entitled to a seat belt instruction, he must present evidence "showing that some part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequences of the tort by not fastening his seat belt,"⁶¹ or "which connected [the] injuries to her failure to be 'buckled up.' "⁶² In *Gibson*, the defendant failed to produce any such evidence. In *Rhinebarger*, the court of appeals did not give weight to the testimony of an apparently non-expert witness who gave his opinion as to the relationship between the failure to wear seat belts and the injuries. In rejecting this testimony, however, the *Rhinebarger* court indicated at least two kinds of witnesses whose testimony would be credited. Presumably a person "qualified as a safety expert" or one with "extensive experience as a police officer" would be competent to testify as to the relationship between not wearing seat belts and the injury.⁶³ Therefore, any defendant proposing to interject a seat belt defense should provide such expert testimony.

2. *Contributory Negligence*.—*Frankfort v. Owens*,⁶⁴ a case as interesting for the exchange between defense counsel and a witness for the plaintiff as for its discussion of the law, held that the plaintiff, who was injured while walking across a multi-laned street in Indianapolis, was contributorily negligent in doing so. The plaintiff was held to have violated section 9-4-1-87(a) of the Indiana Code,⁶⁵ which requires vehicles to yield the right-of-way to pedestrians. The violated provision states that "no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield."⁶⁶ The plaintiff had been standing in a protected area behind a parked telephone company truck that was effecting repairs, and he stepped from behind it into the path of a car driven by one of the defendants. The plaintiff argued that that area should not be considered a "place of safety" under the statute, and since he had not left a curb, he had not violated the statute. The Indiana Court of Appeals disagreed, because the truck was surrounded by traffic control

jected the seat belt defense in *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974).

The application of the avoidable consequences doctrine to seat belt cases is criticized by Judge Buchanan in his concurring opinion in *Rhinebarger*. 362 N.E.2d at 186-87. He strongly advocates leaving the question to the legislature.

⁶¹*Kavanagh v. Butorac*, 140 Ind. App. at 149, 221 N.E.2d at 830.

⁶²*Gibson v. Henninger*, 350 N.E.2d at 634.

⁶³*Rhinebarger v. Mummert*, 362 N.E.2d at 186.

⁶⁴358 N.E.2d 184 (Ind. Ct. App. 1976).

⁶⁵IND. CODE § 9-4-1-87(a) (1976).

⁶⁶*Id.*

cones and a uniformed man was directing traffic. It held, therefore, that there was some evidence from which the jury could infer that the plaintiff was contributorily negligent, and that the trial court was correct in not withdrawing that issue from the jury.⁶⁷

D. *Loan Receipt Agreements*

The loan receipt agreement has continued to be a subject of judicial scrutiny.⁶⁸ Most recently, the First District Court of Appeals, in two separate decisions, passed upon the procedural effect of such agreements at trial. The desirability of such agreements from a policy standpoint is an issue that has previously been settled in favor of encouraging such agreements.⁶⁹

The first of the two latest cases, *Burkett v. Crulo Trucking Co.*,⁷⁰ involved an action against a truck owner, McMurry, and the company to which he had leased his truck, Crulo. Prior to the commencement of the trial, the plaintiff entered into a loan receipt agreement with the representatives of McMurry, who died prior to trial, pursuant to which they agreed to loan the plaintiff \$82,000, repayable only if the plaintiff recovered more than \$50,000 from the company that had leased the truck.

Crulo, the lessee company, moved for a separate trial, alleging prejudice to it through the truck owner's successors' participation at trial after entering into such an agreement. After an analysis of the history of loan receipt agreements and their approval in Indiana courts, the court noted that while they have been approved in principle, the "innumerable variations" in which they appear requires the court to determine the "specific effect" of each agreement in each case.⁷¹

McMurry's successors were given full rights of participation at trial as defendants. Crulo objected to their participation, alleging they had presented a sham defense whose only purpose was to assist the plaintiff in recovering a high verdict against Crulo.

⁶⁷358 N.E.2d at 190. Another case during the survey period discussed contributory negligence. In *McKeown v. Calusa*, 359 N.E.2d 550 (Ind. Ct. App. 1977), the court noted that a defendant's willful and wanton misconduct can overcome the defense of contributory negligence, but no such misconduct was found on the defendant's part in that case.

⁶⁸See, e.g., *American Transp. Co. v. Central Ind. Ry.*, 255 Ind. 319, 264 N.E.2d 64 (1970); *Geyer v. City of Logansport*, 346 N.E.2d 634 (Ind. Ct. App. 1976); *Scott v. Krueger*, 151 Ind. App. 479, 280 N.E.2d 336 (1972); *Northern Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1969); *Klukas v. Yount*, 121 Ind. App. 160, 98 N.E.2d 227 (1951).

⁶⁹See the authorities cited at note 68 *supra*.

⁷⁰355 N.E.2d 253 (Ind. Ct. App. 1976).

⁷¹*Id.* at 258.

The court of appeals agreed and held that Crulo was entitled to a separate trial. The agreement, which was quoted in full, was rife with conclusory language as to each defendant's negligence and admitted McMurry's liability. In so doing, it foreclosed, in the court's opinion, any justiciable issues between the plaintiff and McMurry. "McMurry, in fact if not in form, had ceased to be a defendant . . ."⁷² His participation in trial, therefore, served no useful purpose but to confuse the real issues and to "dilute the procedural rights"⁷³ of Crulo. "After the loan was made, McMurry had no greater right to participate in the trial to protect his 'loan' than would a stranger to the action who had loaned Burkett money for the duration of the trial."⁷⁴

The court noted that a previous Indiana decision⁷⁵ had affirmed the denial of a separate trial motion under similar circumstances, but the court distinguished the earlier case because the participating "lender" had denied negligence in the agreement and had not totally limited its exposure to the amount loaned, in the event judgment was rendered against it alone. In dictum, the *Burkett* court anticipated that future resourceful drafters of such agreements would no doubt be able to circumvent its decision to the detriment of non-paying defendants. Colorfully, it concluded that it was applying a "Band-Aid to an abcess."⁷⁶ Nonetheless, the court expressed its purpose: "firing a shot across the bow"⁷⁷ of those who would seek to misuse such agreements in the future to deprive non-paying defendants of a fair trial.

Despite its ballistics display, the First District Court of Appeals was again confronted with the question of the procedural effect to be given loan receipt agreements in *City of Bloomington v. Holt*.⁷⁸ In this case, the plaintiff's decedent was killed when she lost control of her car on a patch of ice on a state highway. The ice was created by leakage from a broken water pipe that passed under the highway and serviced the Voyles residence. The Voyles were made defendants, along with the City of Bloomington, the State of Indiana, and the State Highway Commission. After the commencement of trial, the Voyles entered into a loan receipt agreement with the plaintiff. They participated fully in the trial proceedings; however, the state alleged that they "appeared to behave like plaintiffs rather than defendants."⁷⁹ The plaintiff was awarded \$100,000; the state and the Highway Commission appealed.

⁷²*Id.* at 259.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Northern Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1969).

⁷⁶355 N.E.2d at 259.

⁷⁷*Id.* at 261.

⁷⁸361 N.E.2d 1211 (Ind. Ct. App. 1977).

⁷⁹*Id.* at 1215.

The court of appeals once again approved loan receipt agreements as valid in Indiana, citing its own earlier decision in *Burkett* for the proposition that a defendant who can show that he has been prejudiced by the agreement has alternatives to relieve the prejudice, such as a motion for separate trial. In *Holt*, however, the state was not aware of the agreement until "several days into the trial"⁸⁰ and could not have made a pre-trial motion for separation. The state therefore argued that it had been prejudiced by late notice of the agreement. However, the court refused to hold that such agreements must be entered into prior to trial and devoted the remainder of its opinion to a consideration of the alternatives open to non-paying defendants. In so doing, the court found no prejudice in the Voyles' nonparticipation in voir dire or their use of two peremptory challenges. Somewhat abruptly, the court concluded there could be no prejudice to other parties through the exercise of peremptory challenges.⁸¹ No consideration was given to the practical effect of a sham defendant's use of a portion of a finite number of peremptory challenges divided among all the defendants.

The court rejected the contention that the state was prejudiced because the Voyles' "defense" was designed to assist the plaintiffs and defeat the state, reasoning that antagonism between codefendants is inevitable as each attempts to shift the blame to the other. In addition, it found no significance in the fact that the Voyles gave the final closing argument, noting that such questions of sequence are within the discretion of the trial court. Thus, no prejudice to the state was found to have resulted from the active participation of the Voyles at trial.⁸² That the court reached this conclusion without examining the language of the agreement is somewhat surprising in light of its effort in *Burkett* to distinguish cases allowing participation on the basis of the language in the agreement. Nowhere in the *Holt* opinion is the precise language of the agreement reported. A jury instruction indicated that the Voyles denied liability—a factor that the *Burkett* court said was favorable to participation. The instruction did not disclose, however, whether the Voyles could have suffered a levy of execution for any judgment in excess of the loan if judgment were rendered against them alone, which was the second distinguishing factor noted in *Burkett* in favor of participation at trial.⁸³ The failure of the court to rely on these factors in *Holt* arguably diminishes the importance placed upon them in *Burkett*.

The state also alleged error in the trial court's refusal to permit the state to examine the plaintiff as to the nature of the agreement.

⁸⁰*Id.*

⁸¹*Id.* at 1215-16.

⁸²*Id.* at 1217.

⁸³355 N.E.2d at 259.

While the trial court refused to allow such inquiry, it did instruct the jury that such an agreement existed, even though the Voyles denied liability.⁸⁴ The jury was further told that the Voyles would recover their loan only if the plaintiff received a judgment against the other defendants. The jury was instructed to consider the agreement in determining any defendant's liability or the amount of damages, but only as it affected the interests of the parties.

The court of appeals found no compounding of error in this instruction, but the court failed to decide whether the original exclusion of the testimony was in error, saying that any error was rendered harmless by the instruction, since the instruction allowed the state the benefit it would have received from the excluded testimony.⁸⁵ This conclusion is questionable, given the general wording of the instruction and its failure to detail the amounts or the possibility of further liability of the Voyles. No doubt the state was seeking more specific information when it sought to elicit testimony concerning the agreement from the plaintiff. The court's holding is consistent, however, with the trial court's instruction that the only purpose for disclosing the agreement to the jury is to show its effect on the interests of the parties. The interests of the plaintiff and the non-lending defendants underwent no apparent change by reason of the agreement. The plaintiff still had every interest in recovering from the non-lending defendants, who, in turn, had every interest in avoiding a finding of liability, including their natural antagonism toward each other. Therefore, the agreement had no hidden effect

⁸⁴The text of the instruction, as quoted by the court of appeals was:

You are instructed that there exists in this case a loan receipt agreement by and between the plaintiff, Eris Holt and defendants Harold E. Voyles and Gretna K. Voyles.

That in the agreement the Defendants Harold E. Voyles and Gretna K. Voyles continue to deny liability but enter into said agreement because of the uncertainty of the result of this case.

That plaintiff entered into the agreement to receive some money at this time without jeopardizing his claim against the City of Bloomington, State of Indiana or the Indiana State Highway Commission.

That said agreement provides for a loan by defendants Harold E. Voyles and Gretna K. Voyles to plaintiff of a sum of money repayable to Defendants Voyles only in the event that plaintiff receives a judgment from the City of Bloomington and/or the State of Indiana and/or the Indiana State Highway Commission.

You are not to consider the loan agreement in determining the liability of the City of Bloomington, Harold E. Voyles, Gretna K. Voyles, the State of Indiana, or the Indiana State Highway Commission. Nor should you consider the agreement in determining the amount of damages, if any. *You're only to consider the agreement as it effects [sic] the interests of the parties.*

361 N.E.2d at 1217 (emphasis added by the court).

⁸⁵*Id.*

on the plaintiff's testimony. If, however, the state had sought to elicit the excluded testimony from one of the Voyles, a much stronger argument could be made that a vague and general instruction, such as the one given, did not allow the same benefit the testimony would have.

The state challenged the instruction as incomplete and misleading for failure to disclose the amount of the loan. The court of appeals found no reason for disclosing the amount to the jury and dismissed the issue as having been waived by the state for failure to submit an instruction that included the amount.⁸⁶ The state was thus caught in the position of maintaining that an instruction was insufficient to correct the error of excluded testimony and the need to submit an instruction of its own.

The variations between the *Burkett* and *Holt* decisions are in keeping with the court's prophecy in *Burkett* that the infinite combinations of conceivable events and possible agreements frustrate the development of firm rules governing loan receipt agreements. Hopefully, however, the attempt to move toward some useful rules will continue as it has in other states,⁸⁷ with the ultimate goal of a fair trial for the non-lending defendants serving as the underlying analytical tool. Presently in Indiana, the question of whether the amount of the loan or, indeed, the agreement in its entirety must or should be excluded from evidence remains unanswered, as does the issue of participation as a witness of the "lender" if dismissed from the action.⁸⁸ The "abcess" needs further treatment.

E. Damages

Of some interest in the damages area is the case of *Charlie Stuart Oldsmobile, Inc. v. Smith*,⁸⁹ in which the plaintiff sought damages for mental anguish in connection with the failure of the defendant car dealer properly to repair plaintiff's automobile. After his purchase of the auto from the defendant in February of 1970, the plaintiff returned it for repairs on no fewer than nine occasions,

⁸⁶*Id.*

⁸⁷*E.g.*, *Sequoia Mfg. Co. v. Halec Constr. Co.*, 570 P.2d 782 (Ariz. 1977); *Reese v. Chicago, Burlington & Quincy R.R.*, 55 Ill. 2d 356, 303 N.E.2d 382 (1973); *Bedford School Dist. v. Caron Constr. Co.*, 367 A.2d 1051 (N.H. 1976). See the excellent discussion of this subject in Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 831 (1977).

⁸⁸See Marshall, *Direct and Cross-Examinations of Witnesses and Parties at Trial*, reprinted in *Voir Dire to Verdict*, Thirteenth Annual Institute, Indiana Trial Lawyers Association 50-53 (1977) (course manual available from the Indiana Trial Lawyers Association, 6201 Carrollton Ave., Indianapolis, Ind. 46220).

⁸⁹357 N.E.2d 247 (Ind. Ct. App. 1976), *partially vacated on rehearing*, 362 N.E.2d 947 (Ind. Ct. App. 1977).

after many of which the auto had more defects than when it had been taken to defendant's shop.⁹⁰ After being unsuccessful in having his car repaired, the plaintiff filed suit for breach of warranty and tortious conduct in the repair of the auto, seeking actual damages, damages for mental anguish, and punitive damages. The punitive damages prayer was deleted from the complaint prior to trial. Plaintiff received a bench verdict for \$5,000.

After reviewing the evidence, the Indiana Court of Appeals concluded that the evidence supported an award of only \$4,000 in damages to the car, and therefore the trial judge must have awarded \$1,000 for mental anguish.⁹¹ Characterizing mental suffering as "parasitic to the host cause of action," the court of appeals reviewed the authorities and policy reasons, and concluded that Indiana's "rule of ancient vintage"—that damages for mental anguish are not recoverable without accompanying physical injury—remains valid today.⁹² The court noted there can be exceptional circumstances in which such damages may be recovered in connection with injuries to personal property "if the act occasioning the injury was inspired by fraud, malice, or like motives, involving intentional conduct."⁹³ Finding that "[t]he wrongful acts of Charlie Stuart were neither intentional nor malicious,"⁹⁴ but merely negligent, the court of appeals concluded that mental anguish was not a proper element of damages in the present case.⁹⁵

⁹⁰357 N.E.2d at 248-49.

⁹¹*Id.* On rehearing, the court of appeals vacated its previous holding to the extent that it found the \$5,000 verdict to be severable. Rather, since the evidence of damage to plaintiff's car was conflicting, the amount attributable to mental distress was not ascertainable with certainty. Therefore, the case was remanded for a new trial on the issue of damages. The remainder of the court's opinion, which disallowed damages for mental distress under the facts of this case, still stands. 362 N.E.2d at 948-49.

⁹²357 N.E.2d at 253-55.

⁹³*Id.* at 254.

⁹⁴*Id.* at 255.

⁹⁵Two other damages cases worthy of mention are *St. Joseph Bank & Trust Co. v. Wackenhut Corp.*, 352 N.E.2d 842 (Ind. Ct. App. 1976), and *Jos. Schlitz Brewing Co. v. Central Beverage Co.*, 359 N.E.2d 566 (Ind. Ct. App. 1977). In *St. Joseph*, the owner of a leased building that burned sought damages for lost rental from the defendant company, whose employee had been guarding the building. The court equated lost rental with lost profits and concluded such damages were not foreseeable and would encourage speculation. *Schlitz* continued the trend of the past few years of overlapping tort and contract theories, and awarded punitive damages in a commercial contract case based on conduct of the defendant that was "tortious in nature." 359 N.E.2d at 580. See, e.g., *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845 (Ind. 1977); *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976). In *Schlitz*, the court of appeals did not note that it was applying cases that allowed punitive damages in the consumer context to a commercial relationship without changing the standards required to award punitive damages. Oral arguments on petition to transfer were heard by the Indiana Supreme Court on February 14, 1978.

XVIII. Trusts and Decedents' Estates

*Debra A. Falender**

During the survey period, several interesting developments occurred in the areas of trusts, wills, intestate succession, guardianships, and fiduciary duties. In addition to the principal cases reviewed in this Survey, Indiana courts discussed missing heirs,¹ claims against decedents' estates,² and constructive trusts³ and the legislature made several minor changes in the Probate Code⁴ and Trust Code.⁵

A. Trusts

The most significant Indiana case involving trusts and decedents' estates decided during the survey period was *Leazenby v. Clinton County Bank & Trust Co.*⁶ In 1951, Cloyd and Elsie Leazenby were married; it was the second marriage for each of

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¹*In re Estate of Jaques*, 354 N.E.2d 283 (Ind. Ct. App. 1976) (heir could seek modification of a court order decreeing him a missing heir, pursuant to IND. CODE § 29-1-17-12(b) (1976), on application filed, as provided in *id.* § 29-1-1-21, within one year after discharge of personal representative on final settlement).

²*Paidle v. Hestad*, 348 N.E.2d 678 (Ind. Ct. App. 1976) (right of a tenant in common to recover contribution from other cotenants is an equitable lien on other cotenants' shares until all the equities of the cotenants are adjusted, and failure to file a claim against a deceased cotenant's estate does not bar enforcement of the lien, under IND. CODE § 29-1-14-1(e) (1976), upon subsequent partition).

³*Hall v. Indiana Dep't of State Revenue*, 351 N.E.2d 35 (Ind. Ct. App. 1976) (because of confidential attorney-client relationship at time of transfer of property from client to attorney, burden of proof is on attorney to show fairness of the transaction and absence of undue influence in a subsequent action by client to impose a constructive trust).

⁴Obsolete language regarding homestead, widow's, and family allowance was deleted from IND. CODE § 29-1-3-7 (1976). Death benefits payable under insurance policies are now included as obligations payable under the small estates procedure. *Id.* § 29-1-8-1(c) (1977). Once a petition for unsupervised administration is granted, the personal representative's authority under that order is not open to collateral attack on grounds other than the issuing court's lack of jurisdiction. *Id.* § 29-1-7.5-2(b). The new Probate Code sections clarify the duties and liabilities of persons who assist a personal representative or deal with him for value. *Id.* §§ 29-1-10-12.5, 29-1-17-10(c).

⁵IND. CODE § 30-4-3-3(a)(5) (1976) was amended to allow trustees to purchase and sell stock options. *Id.* § 30-4-3-31 was amended to authorize court modification of charitable remainder trusts created after July 31, 1969, and before January 1, 1978, to conform to Internal Revenue Code provisions.

⁶355 N.E.2d 861 (Ind. Ct. App. 1976).

them. In 1969, Elsie executed a revocable inter vivos trust agreement in which the Clinton County Bank, as trustee, was to pay the income to Elsie for life with power to expend income and corpus, in its sole discretion, for Elsie's "care, use, maintenance, and/or benefit."⁷ The remainder beneficiaries were Elsie's two daughters, a granddaughter, and Cloyd, who was given the right to reside in Elsie's home for six months after her death. In addition to Elsie's reserved interest in income and corpus, and her right to revoke, alter, or amend the trust, she also reserved some power to control the actions of the trustee. The trust provided: "It is the intent of the parties hereto that this trust be run as a convenience for the Settlor, and that the Trustee, in the absence of directions from Settlor, may exercise the broad discretion given it herein."⁸

Eventually all of Elsie's property was placed in the trust. After Elsie's death,⁹ Cloyd argued that the trust was "colorable and illusory and a fraud upon him because it defeated his statutory right to share in his spouse's estate."¹⁰ The Indiana Court of Appeals held, without qualification, that the surviving spouse has no right to reach the assets of a valid inter vivos trust to satisfy his or her elective share of the decedent's estate. The *Leazenby* court rejected the illusory transfer test¹¹ and the "fraud on the marital rights" test,¹²

⁷*Id.* at 862.

⁸*Id.*

⁹Upon Cloyd's petition for appointment of a personal representative and for the issuance of letters testamentary for Elsie's estate, the court appointed the Clinton County Bank as executor. Cloyd's arguments were made in objection to a petition by the bank, as executor, to rescind the order of appointment because there was no probate estate (all of Elsie's assets were in the trust) and no need for an executor. *Id.* at 862-63.

¹⁰*Id.* at 863. Elsie's will made no provision for Cloyd. As a second childless surviving spouse, Cloyd could elect to take against the will one-third of Elsie's net personal estate and a life estate in one-third of her land. IND. CODE § 29-1-3-1(a) (1976). However, unless the assets transferred to the trust in Elsie's lifetime could somehow be considered part of Elsie's estate, Cloyd's election consisted of the right to take one-third of nothing.

¹¹In some states, an otherwise valid trust may be partially invalid as against the surviving spouse of the settlor if the settlor reserved so much dominion and control over the trust as to render the trust illusory. *E.g.*, *Montgomery v. Michaels*, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937) (changed by statute). The *Leazenby* court decided that this test is unsatisfactory because of vagueness and uncertainty as to the degree of dominion and control sufficient to render the trust illusory. 355 N.E.2d at 864.

¹²A few courts will set aside an inter vivos transfer if made with intent to defeat the surviving spouse's rights. *E.g.*, *Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W.2d 327 (1947). See also *Stroup v. Stroup*, 140 Ind. 179, 39 N.E. 864 (1895) (fraud on marital rights discussed, but trust otherwise invalid because trustee possessed only naked or nominal title, which did not impair full ownership rights of settlor-husband). The *Leazenby* court reasoned that if a surviving spouse had no right or interest in the pro-

both of which have been used by courts to partially invalidate otherwise valid inter vivos trusts in favor of the surviving spouse's elective share.¹³ After *Leazenby*, it seems that in Indiana no special test will be applied to subject a valid trust to a surviving spouse's elective claim against the will of the deceased settlor.

In affirming the trial court's decision upholding the validity of Elsie's trust, the court of appeals reviewed the trust in light of the following circumstances, which could have rendered it invalid. The court noted that the trustee possessed more than a nominal title without powers or duties related to the administration of the trust.¹⁴ The trustee was not merely an agent of the settlor.¹⁵ The settlor intended to create vested interests in the beneficiaries when the property was placed in the trust.¹⁶ Finally, there was no undue in-

property of the deceased spouse during the deceased spouse's lifetime, a valid inter vivos trust agreement could not be fraudulent as to the survivor. 355 N.E.2d at 865. However, it should be noted that Cloyd and Elsie kept their property separate during the marriage, and Cloyd presumably was aware of the existence of the trust. *Id.* at 861-62, 866. If these circumstances do not exist in a subsequent case which seeks to invalidate a trust, *Leazenby* might be distinguished.

¹³Other courts have examined all aspects of the inter vivos transaction, including its fairness in light of the size of decedent's estate and in light of decedent's responsibilities to the surviving spouse. *E.g.*, *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954). This all-inclusive test is as objectionable in its uncertainty as the illusory transfer test, discussed in note 11 *supra*, but it does afford protection to a surviving spouse in need.

Statutes in some jurisdictions have afforded partial resolution of the conflict between the policy of protecting the surviving spouse from disinheritance and the policy of allowing free alienation of property. In New York, under certain circumstances, a revocable trust can be reached by the surviving spouse to satisfy his or her elective share. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967). Section 2-202 of the Uniform Probate Code adopts the concept of an "augmented estate" for the purpose of computing the surviving spouse's elective share. The value of property gratuitously conveyed by the deceased spouse in his or her lifetime without the consent of the surviving spouse is included in the "augmented estate," and the value of property acquired by the surviving spouse from the decedent is then deducted. The surviving spouse is entitled to elect to take one-third of the "augmented estate." UNIFORM PROBATE CODE § 2-201.

¹⁴355 N.E.2d at 864. If the trustee has no powers or duties, title vests directly in the beneficiary. IND. CODE § 30-4-2-9 (1976). One exception is the so-called Illinois Land Trust. *Id.* § 30-4-2-13. Elsie's trustee was vested with broad discretionary powers and duties.

¹⁵355 N.E.2d at 864. The distinction between a trustee and an agent is found in RESTATEMENT (SECOND) OF TRUSTS § 8 (1959). A right to income for life, the reserved power to revoke or modify, and the power to control the trustee in administration does not render the trust a mere agency. *Id.* § 57. Elsie appeared to reserve to herself some control over the trustee's exercise of its powers. See text accompanying note 8 *supra*. However, the court felt that Elsie's failure to exercise her power to direct the trustee evidenced her intention that the trustee was not to act as her agent. 355 N.E.2d at 866.

¹⁶"Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is in-

fluence, duress, mistake, or a tendency to deceive surrounding the transfer of the settlor's property into trust.¹⁷

B. Wills

In *Haverstick v. Banet*,¹⁸ decedent's heirs attempted to waive the decedent's physician-patient privilege in an effort to invalidate the decedent's will. The Indiana Court of Appeals rather reluctantly followed Indiana precedent in affirming the trial court's decision to disallow the physician's testimony at trial. This precedent allowed only the personal representative of the decedent to waive the physician-patient privilege,¹⁹ and then only when seeking to protect or conserve the interests of the estate²⁰ or when seeking to uphold the validity of the decedent's will.²¹ Clearly, the Indiana view did not always allow the presentation of all the relevant facts in a will contest.

In a decision rendered after the end of the survey period, the Indiana Supreme Court overruled this precedent and adopted the majority rule, which permits the heirs of the deceased patient, as well as the personal representative, to waive the physician-patient privilege in an action to contest the will.²² In almost every other jurisdiction, by case law or by statute, the privilege may be waived not only by decedent's personal representative, but also by decedent's heirs, next of kin, or legatees. Because all parties in a will contest claim under, and not adversely to, the decedent, and

valid unless the requirements of the Statute of Wills are complied with." RESTATEMENT (SECOND) OF TRUSTS § 56, at 145 (1959). Settlor's reservation of a life interest and a power to revoke and a power to control the trustee as to administration does not render the trust testamentary. *Id.* § 57. Recall the extensive control that may be reserved in a Totten trust, which is not testamentary. *Id.* § 58.

¹⁷355 N.E.2d at 865. Because the trust paid for Elsie's medical bills and nursing home care, Cloyd must have been aware of the trust. There was no evidence that Cloyd "did not know and fully approve of the trust arrangement." *Id.* at 866.

¹⁸349 N.E.2d 282 (Ind. Ct. App. 1976), *rev'd and remanded*, 370 N.E.2d 341 (Ind. 1977).

¹⁹See, e.g., *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904) (heirs seeking to invalidate decedent's will may not waive the privilege over objection of other heirs and devisees); *Gurley v. Park*, 135 Ind. 440, 35 N.E. 279 (1893) (only the patient or, in event of his death, his legal representative may waive the physician-patient privilege); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889) (in a will contest, only the legal representative of the patient seeking to maintain the will may waive the physician-patient privilege). Cf. *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949) (heirs and personal representative may jointly waive the privilege in an action against a third party transferee to set aside a fraudulent deed).

²⁰*Scott v. Smith*, 171 Ind. 453, 85 N.E. 774 (1908).

²¹*Heaston v. Kreig*, 167 Ind. 101, 77 N.E. 805 (1906); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889).

²²*Haverstick v. Banet*, 370 N.E.2d 341 (Ind. 1977).

since the decedent's interests are furthered by the ascertainment of the truth as to the validity of his will, the better rule allows either the executor or the heirs or devisees to waive the privilege.²³

In *Flagle v. Martinelli*,²⁴ Flagle unsuccessfully argued that an improperly executed will, though not admissible to probate, so substantially complied with the statutory execution formalities²⁵ as to be effective to revoke a prior will. Although Indiana courts have upheld wills in spite of slight irregularities in form,²⁶ the execution of the will in *Flagle* did not even approach substantial compliance with the statutory requirements. The will was signed by the testatrix outside the presence of the witnesses, and the witnesses did not sign in the presence of each other.²⁷ Furthermore, if Flagle's argument had been upheld, the effect would have been a revocation of the prior will in favor of intestacy. The doctrine of dependent relative revocation presumes that the testator's intent to revoke a prior will is dependent on the validity of a new will.²⁸

C. Intestate Succession

A recent decision of the United States Supreme Court calls into question the constitutionality of Indiana's statutory provision regard-

²³See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 102 (2d ed. E. Cleary 1972). Decedent's estate "can only be protected by establishing or defeating the [will] as the truth so ascertained may require." *Winters v. Winters*, 102 Iowa 53, 59, 71 N.W. 184, 185 (1897). For a discussion of the various jurisdictional holdings, see Annot., 97 A.L.R.2d 393 (1964).

²⁴360 N.E.2d 1269 (Ind. Ct. App. 1977).

²⁵IND. CODE § 29-1-5-3 (1976). By statute, a will may be revoked only by physical act or by a writing executed with the same formalities required for the execution of wills. *Id.* § 29-1-5-6.

²⁶See, e.g., *Herbert v. Berrier*, 81 Ind. 1 (1881) (testator's signature affixed by one of subscribing witnesses at his direction); *Bundy v. McKnight*, 48 Ind. 502 (1874) (request to witnesses need not be directly from testator); *Thrift Trust Co. v. White*, 90 Ind. App. 116, 167 N.E. 141 (1929) (handwritten superscription by testatrix declaring the document to be "the will of Belle Stockman" satisfied statutory requirement that the will be signed by testatrix).

²⁷The court noted that another problem with the will was the fact that one of the witnesses was a primary legatee and was therefore incapacitated under IND. CODE § 29-1-5-2 (1976). However, the interest of a witness will not necessarily destroy the validity of the will. If the will cannot be proved without the testimony of the interested witness or proof of his signature, the will is void as to him and he will be compelled to testify as if no interest passed to him. *Id.* § 29-1-5-2(b).

²⁸See *Roberts v. Fisher*, 230 Ind. 667, 105 N.E.2d 595 (1952).

In another revocation-of-wills case decided during the survey period, *In re Estate of Miller*, 359 N.E.2d 270 (Ind. Ct. App. 1977), the court of appeals decided that evidence that the testator was placed in a nursing home approximately six months after the execution of his will until his death was not sufficient to rebut the presumption of revocation that arises when an executed copy of the will is traced to testator's possession and cannot be found after his death.

ing inheritance rights of illegitimate children.²⁹ In *Trimble v. Gordon*,³⁰ the Supreme Court concluded that an Illinois intestate succession statute violated the equal protection clause of the fourteenth amendment by invidiously discriminating against illegitimate children. The Illinois statute provided that an illegitimate child is the heir of his or her father only if the parents intermarry and the father acknowledges the child as his own.³¹ The Illinois Supreme Court had found that the statute was justified by the "state interests in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death."³²

The United States Supreme Court did not deny the appropriateness of the state's interest in promoting the family unit but found no rational relationship between the statute and the stated purpose.³³ According to the Court, imposing sanctions on children born of illegitimate relationships is an "ineffectual—as well as an unjust—way"³⁴ of influencing the conduct of the parents. The Court was more impressed with the state's interest in "establishing an accurate and efficient method of disposing of property at death."³⁵ The Court stated, "The more serious problems of proving paternity [and the related danger of spurious claims] might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."³⁶ The constitutional flaw in the Illinois statute, however, was its exclusion of some significant categories of illegitimate children whose paternal inheritance rights could be recognized without jeopardizing the state's interest in efficient and accurate disposition of property. The statute was not "carefully tuned to alternative considerations."³⁷

In *Trimble*, the facts illustrated the constitutional infirmity. The Circuit Court of Cook County, Illinois, prior to decedent's death, had entered a paternity order finding him to be the child's father and

²⁹IND. CODE § 29-1-2-7 (1976).

³⁰430 U.S. 762 (1977).

³¹ILL. REV. STAT., ch. 3, § 12 (1973) (repealed 1976) (recodified in part at *id.* § 2-2 (1976)).

³²430 U.S. at 766 (construing *In re Estate of Karas*, 61 Ill. 2d 40, N.E.2d 234 (1975)).

³³The Supreme Court rejected the argument that statutory classifications based on illegitimacy are suspect and trigger strictest scrutiny of the statutory justifications. 430 U.S. at 767. However, the scrutiny "is not a toothless one." *Id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

³⁴430 U.S. at 770 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

³⁵*Id.* at 766.

³⁶*Id.* at 770.

³⁷*Id.* at 772 (quoting *Mathews v. Lucas*, 427 U.S. 495, 513 (1976), wherein the careful attunement test was first announced).

ordering him to make weekly support payments. The decedent had supported the child in accordance with the court order and openly acknowledged her as his own. If the statute were "carefully tuned to alternative considerations," the Court reasoned, the adjudication of paternity "should be equally sufficient to establish [the illegitimate's] right to claim a child's share of [the decedent's] estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances."³⁸

The Indiana statute allows illegitimate children to inherit from intestate fathers in only two circumstances: either when the father marries the mother *and* acknowledges the child to be his own, or when paternity of the child has been "established by law" during the father's lifetime.³⁹ In 1970, the Indiana Supreme Court decided that the statute is not unconstitutional as a denial of equal protection in light of its purpose to "prevent fraudulent claims on the estate of one deceased."⁴⁰

In light of *Trimble*, the constitutionality of Indiana's statute is uncertain. The Indiana statute is clearly more "carefully tuned to alternative considerations" than was the offending Illinois statute⁴¹ but perhaps not as carefully tuned as the United States Supreme Court demands. In a footnote, the *Trimble* Court stated:

Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.⁴²

³⁸*Id.* at 772.

³⁹IND. CODE § 29-1-2-7 (1976). The testimony of the mother may be received to establish paternity and acknowledgment, but "no judgment shall be made upon the evidence of the mother alone." *Id.* The phrase "established by law" contemplates a judicial proceeding in which "the finding of paternity is necessary for the result reached and the quantum of proof establishing such paternity meets the standard set forth in the inheritance statute." *Burnett v. Camden*, 253 Ind. 354, 357, 254 N.E.2d 199, 201, *cert. denied*, 399 U.S. 901 (1970).

⁴⁰*Burnett v. Camden*, 253 Ind. 354, 361, 254 N.E.2d 199, 201 (1970).

⁴¹The illegitimate child in *Trimble* could have inherited from the putative father in Indiana. The paternity order entered in the father's lifetime would have satisfied IND. CODE § 29-1-2-7(a) (1976).

⁴²430 U.S. at 772 n.14.

Indiana's statute requires marriage to the mother in addition to the father's formal acknowledgment of paternity before allowing an inheritance claim, unless there has been a successful paternity suit. However, formal acknowledgment alone, by affidavit or in a written contract, for example, would seem to satisfy the state's interest in preventing fraudulent inheritance claims. Thus, it is questionable whether the statute is "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity."⁴³

D. Guardianship

In *Wurm v. Haessly*,⁴⁴ an elderly widow appealed from a judgment appointing guardians over her estate. Mrs. Wurm contended that the only reason for appointing the guardians was her physical inability to manage her property. She argued that to determine competency on purely physical grounds is unconstitutional.⁴⁵ The Indiana Court of Appeals agreed that a determination of incompetency must include an evaluation of the person's mental capacity.⁴⁶ A physically incapacitated but mentally competent person has the option of choosing an agent to manage his property. The majority of the court held that a determination of incompetency must include an evaluation of "mental awareness" or "mental physiology."⁴⁷

Judge Staton, in a dissenting opinion, considered the majority's mental awareness test too broad. The test, said Judge Staton, is a statutory one, and involves a determination of the person's ability to reasonably exercise his will and judgment in managing his property, in caring for himself, or in choosing a competent agent to stand in his stead.⁴⁸

Judge Staton also disagreed with the majority as to whether there was sufficient evidence to support the judgment of the trial court. The majority decided that although there was "little oral testimony . . . to the effect that Martha Wurm was mentally in-

⁴³*Id.* See note 39 *supra* and accompanying text. The only statute that has been successfully put to the test of "careful attunement" was a Social Security Act provision, 42 U.S.C. §§ 402(d)(3), 416(h)(3) (Supp. V 1975), delineating when an illegitimate child is entitled to a presumption of dependency. This statute allowed such a presumption if the decedent "in writing had acknowledged the child to be his." *Mathews v. Lucas*, 427 U.S. 495, 499 (1976).

⁴⁴360 N.E.2d 12 (Ind. Ct. App. 1977).

⁴⁵*Id.* at 14. Mrs. Wurm relied on *Schafer v. Haller*, 109 Ohio St. 322, 140 N.E. 517 (1923).

⁴⁶IND. CODE § 20-1-18-1(c)(2) (1976) defines an "incompetent" as any person who is "[i]ncapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, old age, infirmity or other incapacity, of either managing his property or caring for himself or both."

⁴⁷360 N.E.2d at 15.

⁴⁸*Id.* at 16 (Staton, J., dissenting).

capable of handling her affairs,"⁴⁹ there was ample "other direct evidence" disclosing that Mrs. Wurm "had problems with advanced age and its attendant infirmities of confusion"⁵⁰ Thus, the court of appeals affirmed the trial court's judgment that Mrs. Wurm was "incapable of either managing her property or caring for herself by reason of old age, infirmity, and her inability to withstand undue and inappropriate pressures exerted upon her by certain of her children."⁵¹ The dissent found the evidence to be "totally insufficient" to support the trial court's judgment. Since the evidence did not clearly show that Mrs. Wurm lacked the will and judgment to reasonably manage her property and to reasonably care for herself, Judge Staton reasoned that the taking away of her liberty was unconstitutional.⁵²

Certainly, in determining the sufficiency of the evidence, an appellate court should not weigh the evidence or evaluate the credibility of the witnesses. An appellate court considers the evidence in the light most favorable to the judgment of the trial court because the trier of fact presumably based its judgment on that evidence. The troublesome feature of *Wurm* is the suggestion that the trier of fact

⁴⁹*Id.* at 15. The court continued:

Of her seven children, four stated that she was physically incompetent to manage the business of her farm while simultaneously attesting to her mental capacity. Two of her children and her doctor opined that she was competent to manage her business affairs. Only one definitely felt that his mother was incompetent and incapable of understanding the extent of her property or the nature of her business affairs or her personal affairs. Such a mixture of testimony alone would appear to be inadequate in light of the important concerns we have expressed in protecting an aged person's free will.

Id.

⁵⁰*Id.* The "other direct evidence" pointed out by the majority included evidence that (1) Mrs. Wurm did not understand the "essential thrust" of a power of attorney agreement executed by her; (2) on the night of her husband's funeral, she expressed a desire for the appointment of guardian, and although she visited an attorney and signed the guardianship papers, she later "became hostile" and attempted to renounce the guardianship document; (3) she was confused about the amounts of her savings and where they were located; (4) she told her doctor that she could not write him a check when she was capable of doing so; and (5) she did not know how much her daughter was spending from her checking account. Compare the evidence reviewed in the dissenting opinion. *Id.* at 17-20.

⁵¹*Id.* at 13. Apparently the trial court originally determined that Mrs. Wurm was "unable to take care of her major business affairs solely by reason of physical disability but that she was not mentally uncompetent [sic]." *Id.* at 20 n.3 (quoting Appellant's Brief at 22). Later, in response to argument on a motion to correct errors, and without hearing additional evidence, the trial court rendered the judgment in the language quoted in the text. The last clause of this judgment, regarding "inability to withstand undue and inappropriate pressures," has forboding connotations. If one can exert enough undue pressure on an elderly person so as to confuse that person, then the case for appointment of a guardian has been made.

⁵²*Id.* at 20 (Staton, J., dissenting).

did not base its judgment on the essential question—the determination of Mrs. Wurm's mental incompetency.⁵³ If this is true, it seems inappropriate for the appellate court to review the evidence in order to determine if it is sufficient to support a finding of mental incompetence. Given the nature of the right to liberty that is denied by the imposition of a guardianship, justice would have been better served, at the very least, by a remand for findings on the issue of mental competence by the trier of fact.

E. Fiduciary Duties

In *Pearson v. Hahn*,⁵⁴ the widow of a deceased partner sought the appointment of a receiver and an accounting against the surviving partners of the Martinsville Plaza Company and the Martinsville Leasing Company.⁵⁵ One of the surviving partners had qualified and acted as executor of the deceased partner's estate. While so acting, and pursuant to a provision in the Martinsville Plaza partnership agreement, and as surviving partner, he gave written notice to himself, as executor, of the surviving partners' intent to purchase the decedent's interest in the Martinsville Plaza Company.⁵⁶ Decedent's widow subsequently requested of the executor a financial accounting of the assets and liabilities of both partnerships, but the executor refused her request.

The Indiana Court of Appeals held:

[B]ecause of the conflict of interest which inherently exists between a surviving partner and the beneficiaries of a deceased partner's estate, in agreements to continue the partnership following a partner's death, the surviving partner(s) must make a full disclosure of all assets which

⁵³*Id.* n.3. See discussion in note 51 *supra*.

⁵⁴352 N.E.2d 767 (Ind. Ct. App. 1976).

⁵⁵The Indiana Accounting by Surviving Partners Act, IND. CODE § 23-4-3-1 to -8 (1976), permits the probate court to appoint a receiver to settle the affairs of the partnership when the surviving partners fail to file the required inventory, appraisement, list of liabilities, and bond, or fail to settle the business of the partnership after the death of one of the partners. *Id.* § 23-4-3-5.

⁵⁶352 N.E.2d at 767-71. The Martinsville Plaza partnership agreement provided that the surviving partners could purchase the interest of a deceased partner after giving written notice of their intent to do so within 60 days of the partner's death by paying either the book value or the fair market value determined by a fair appraisal, whichever was lower. After decedent's death, appraisers were hired by the widow and by the surviving partners. The only asset appraised was a 5.43 acre tract of land, and both appraisal reports showed liabilities in excess of assets. Thus, the surviving partners owed nothing upon their election to purchase the deceased partner's interest in the Martinsville Plaza Company. Martinsville Leasing Company apparently had no partnership assets, since all its assets and liabilities were held or owed by the partners and their wives as individuals. *Id.*

arguably belong to the partnership upon request of the deceased partner's executor, and if the surviving partner is serving in the capacity of executor or administrator of his deceased partner's estate, he must make an equally complete disclosure upon request of any interested beneficiary of the deceased partner.⁵⁷

The court remanded the cause to the trial court with directions to have a complete audit conducted of the assets of both partnerships.⁵⁸

XIX. Workmen's Compensation

*Gregory J. Utken**

Several noteworthy decisions were rendered in the area of workmen's compensation during the survey period, including cases of first impression.

A. Dual Capacity

Workmen's compensation is an exclusive remedy for injuries arising out of and in the course of employment; civil actions against an employer for injuries at work are prohibited.¹ However, the Indiana Workmen's Compensation Act does permit initiation of civil actions against "some other person than the employer and not in the same employ."² Recently, attempts have been made to avoid the exclusivity provision of the statute by suing a defendant-employer in

⁵⁷352 N.E.2d at 773-74.

⁵⁸The court did not specifically address the widow's questions of whether the survivor's notice to himself as executor was the kind of notice contemplated by the partnership agreement and whether the notice made applicable the provisions of the Indiana Partnership Act, IND. CODE §§ 23-4-1-1 to -43 (1976), and the Indiana Accounting by Surviving Partners Act, IND. CODE §§ 23-4-3-1 to -8 (1976), regarding dissolution, posting of bonds, and appointment of receivers.

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¹IND. CODE § 22-3-2-6 (1976) states:

The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death. The courts have also consistently so held. *Crowe v. Ben Dee, Inc.*, 149 Ind. App. 280, 271 N.E.2d 509 (1971). *Burkhart v. Wells Elec. Corp.*, 139 Ind. App. 658, 215 N.E.2d 879 (1966). *See also Peski v. Todd & Brown, Inc.*, 158 F.2d 59 (7th Cir. 1946); *Stainbrook v. Johnson County Farm Bureau*, 125 Ind. App. 487, 122 N.E.2d 884 (1954).

²IND. CODE § 22-3-2-13 (1976) states in pertinent part:

Whenever an injury or death, for which compensation is payable under [this

some capacity other than that of employer. This is known as a dual capacity theory. Two decisions during the survey period discussed the concept of dual capacity in work-related accidents and reached the same result.

In *Needham v. Fred's Frozen Foods, Inc.*,³ the claimant was injured cleaning a pressure cooker unit while in the employ of Frozen Foods. Frozen Foods had also designed, manufactured, and installed the pressure cooker. Needham brought an action against the company, not as his employer but as a manufacturer of a defective product. He asserted that claims of negligence, strict liability, and breach of warranty could be brought against Frozen Foods as a manufacturer on a dual capacity theory. The company argued that Needham's injuries arose out of and in the course of employment; therefore, workmen's compensation was his exclusive remedy. In a case of first impression for an Indiana court, the Second District Court of Appeals refused to accept the dual capacity theory. It noted that there was no dispute that the injury arose out of and in the course of Needham's employment; thus, it was precisely the type of injury workmen's compensation was intended to cover.

In reaching the foregoing result, the *Needham* court relied upon the reasoning espoused in *Kottis v. United States Steel Corp.*,⁴ a similar case recently decided by the Seventh Circuit. In *Kottis*, the Seventh Circuit refused to adopt a dual capacity theory under Indiana law. The action was brought for the wrongful death of plaintiff's husband, who was killed while operating a crane for his employer on the employer's premises. The plaintiff based the action upon a dual capacity theory of employer-landowner, contending that she should be able to sue the company as a landowner, since under the same circumstances she could sue a landowner who was not her husband's employer.⁵

Act] shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carrier's payment of or liability to pay compensation under [this Act]

³359 N.E.2d 544 (Ind. Ct. App. 1977).

⁴543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

⁵In rejecting plaintiff's argument, the court observed that such a contention would do "considerable violence to the statutory language." *Id.* at 24. The court then cited *Peski v. Todd & Brown, Inc.*, 158 F.2d 59 (7th Cir. 1946), which held that the Indiana statute's exclusive remedy provision barred a common law action against the employer, who ran a bus service, when an employee was killed on the way to work, even though a third party under contract to the employer would have been liable under the same circumstances.

The district court had granted summary judgment for the company based on its position that workmen's compensation provided the exclusive remedy. On appeal, the Seventh Circuit, after reviewing Indiana law but finding no Indiana cases addressing the question, affirmed. It noted that Indiana courts had repeatedly held workmen's compensation to be an exclusive remedy and had consistently refused to permit actions based upon other statutory or common law duties arising in the course of the employee-employer relationship.⁶ The court stated that there was no basis for allowing an additional remedy when an employment relationship predominates. In this particular instance, the court of appeals noted that one of the purposes of workmen's compensation is to replace actions brought against employers for accidents caused by failure to provide a safe work place.

While the concept of dual capacity has found acceptance in other jurisdictions and in the minds of some commentators,⁷ these two cases make it clear that it cannot be utilized in Indiana. Since workmen's compensation statutes place a limit on recovery, the doctrine of dual capacity favors injured employees who seek to recover amounts in excess of the statutory limits by permitting them to proceed on another theory. While recognizing the policy advantages of adopting such a theory, the court of appeals declared in *Needham* that any change in the law should be made by the legislature and not the courts.⁸

B. Arising Out of and in the Course of Employment

Under workmen's compensation, in order for an injury to be compensable it must arise out of and in the course of employment.⁹ In *Golden v. Inland Steel Co.*,¹⁰ the Second District Court of Appeals

⁶See note 1 *supra*. See also *Hickman v. Western Heating & Air Conditioning, Co.*, 207 F. Supp. 832 (N.D. Ind. 1962).

⁷See, e.g., *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952); *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973); cf. *Costanzo v. Mackler*, 34 Misc. 2d 188, 277 N.Y.S.2d 750 (Sup. Ct.), *aff'd*, 17 App. Div. 2d 948, 233 N.Y.S.2d 1016 (1962) (defendant not considered employer); *Mazurek v. Skaar*, 60 Wis. 2d 420, 210 N.W.2d 691 (1973) (national guardman's recovery from state not restricted to workmen's compensation limits). See also 2A A. LARSON, *WORKMEN'S COMPENSATION LAW* § 72.80 (1976); Vargo, *Workmen's Compensation*, 1974 *Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289, 289 (1974); Comment, *Workmen's Compensation and Employer Usability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

⁸359 N.E.2d at 545.

⁹IND. CODE § 22-3-2-2 (1976) states in pertinent part: "[E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of employment, and shall be bound thereby."

¹⁰359 N.E.2d 252 (Ind. Ct. App. 1976).

illustrated this principle in a brief opinion. The claimant was travelling to work on a public highway and was involved in a near collision with another car. He proceeded into his employer's parking lot, and the driver of the other car pulled in next to him. An argument and altercation ensued in which the claimant lost six permanent teeth. The Industrial Board found that the claimant's condition did not arise out of or in the course of his employment, and the Board denied workmen's compensation. While injuries sustained in an employer's parking lot generally are held to be compensable under workmen's compensation,¹¹ the court of appeals affirmed, finding inescapable the conclusion that it was the traffic incident, which had occurred on the way to work on a public highway, that brought about the injury. Thus, claimant did not sustain an injury by being "specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him."¹²

This issue was also discussed in *O'Dell v. State Farm Mutual Automobile Insurance Co.*,¹³ which held that an employee killed in an employer's parking lot was covered by workmen's compensation. Plaintiff's husband was driving home after work on a thoroughfare maintained by his employer between the plant gate and the employee parking lot. A co-employee on his way to work entered the gate as plaintiff's husband was exiting, and a head-on collision resulted, killing the plaintiff's husband. Plaintiff brought an action for the wrongful death of her husband, seeking to collect on his uninsured motorist coverage. The insurance company defended on the basis that workmen's compensation was the exclusive remedy. However, plaintiff contended that her husband was not in an employee status at the time.

The Third District Court of Appeals upheld the insurance company's position and affirmed dismissal of the action. The court observed that public policy favored liberal construction of the Indiana Workmen's Compensation Act in accidents involving the egress and ingress of employees to their work premises.¹⁴ Thus, whether an injury occurred on the operating premises of the employer was an important determinant of an employment nexus. The court reasoned that employee parking lots and private drives are considered to be within an employer's supervision, relying on its decision in *United States Steel Corp. v. Brown*,¹⁵ which held that

¹¹See, B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 7.7, at 171 (1950).

¹²359 N.E.2d at 253 (quoting *Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, 273, 119 N.E. 149, 150 (1918)).

¹³362 N.E.2d 862 (Ind. Ct. App. 1977).

¹⁴*Id.* at 865 (citing *Reed v. Brown*, 129 Ind. App. 75, 152 N.E.2d 257 (1958) and *Jeffries v. Pitman-Moore Co.*, 83 Ind. App. 159, 147 N.E. 919 (1925)).

¹⁵142 Ind. App. 18, 231 N.E.2d 839 (1967). An additional factor that may have

employees going to and from work who are injured on private roadways owned and operated by the employer were within the workmen's compensation coverage.

C. Statutory Limitation Period

In *Sissom v. Commodore Corp.*,¹⁶ the First District Court of Appeals, in an apparent case of first impression, discussed the statutory limitation period for filing a Form 14 application¹⁷ under a voluntary compensation agreement that states no date for termination of payments. Sissom received an employment-related injury in April of 1971. In accordance with an agreement entered into by the company and Sissom, which was approved by the Industrial Board, Sissom was to receive fifty-seven dollars per week beginning April 19, 1971; the payments were to continue until terminated in accordance with the provisions of the Indiana Workmen's Compensation Act.¹⁸

In February 1973, the company ceased payments and filed a Form 14, seeking to terminate or reduce compensation payments to Sissom. A hearing was set on the company's application, but the company moved to dismiss its application; the motion was granted on June 3, 1975. On June 6, 1975, Sissom filed a Form 14 application. It was denied. He appealed to the full Industrial Board, and they held his application untimely. The Industrial Board reasoned that under section 22-3-3-27 of the Indiana Code¹⁹ an application could not be filed by either party after two years from the last day for which compensation was paid under the original award. Since the company ceased payments under the compensation agreement on February 24, 1973, the Board held Sissom's June 3, 1975, application untimely. Sissom appealed.

The court of appeals reversed and explained the proper procedure for modification or termination of compensation in situations when no date for termination of payments is expressed in the compensation agreement. The court also explained the procedure for

weighed in the court's decision in *O'Dell* was the fact that the plaintiff had already collected full workmen's compensation benefits.

¹⁶349 N.E.2d 724 (Ind. Ct. App. 1976).

¹⁷Form 14 is an application for review of an award because of a change in condition, such as increased or diminished disability.

¹⁸IND. CODE § 22-3-3-27 (1976).

¹⁹*Id.* The provision states in pertinent part:

The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid.

ascertaining when the limitation period for filing a Form 14 begins to run. The court cited an Industrial Board rule which authorized the company to stop compensation payments to Sissom²⁰ but held it had to be construed and applied consistently with the workmen's compensation statute and its underlying purposes.²¹ It therefore read the Board's rule in conjunction with section 22-3-4-5 of the Indiana Code.²² This statutory provision declares that if, after the parties have entered into a compensation agreement approved by the Board, they disagree as to the continuance of payments, either party

²⁰Rule 32 of the Industrial Board Rules of Procedure states:

If an injured employee, or his dependents have been awarded compensation by the industrial board, either by approval of an agreement, or by an award upon a hearing, the employer shall continue the payments of compensation under the terms of such award or agreement for the specific period therein fixed, or until such employee returns to work, or the dependency ends, or the employer shall have disagreed with the injured employee or the dependents as to the continuation of such compensation payments.

In such cases the employer or such employer's insurance carrier, shall file with the industrial board in duplicate, a memorandum prescribed by the industrial board showing payments made, the date of the employee's return to work, the date of cessation and reason for termination of the dependency and any other fact or facts pertaining to the cessation of said payments of compensation.

IND. ADMIN. RULES & REGS. § (22-3-4-14)-1 (Burns 1976).

²¹In Indiana Dept. of State Revenue v. Colpaert Realty Corp., 321 Ind. 463, 109 N.E.2d 415 (1952), it was held that an administrative agency's rules may not add to or detract from its governing statute as enacted.

²²IND. CODE § 22-3-4-5 (1976) reads in full:

If the employer and the injured employee or his dependents disagree in regard to the compensation payable under this act, or, if they have reached such an agreement, which has been signed by them, filed with and approved by the industrial board, and afterward disagree as to the continuance of payments under such agreement, or as to the period for which payments shall be made, or to the amount to be paid, because of a change in conditions since the making of such agreement, either party may then make an application, to the industrial board, for the determination of the matters in dispute.

Upon the filing of such application, the board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the board, of the time and place of hearing. The hearing of all claims for compensation, on account of injuries occurring within the state, shall be held in the county in which the injury occurred, except when the parties consent to a hearing elsewhere. Provided however, That in disputes wherein the employer denies liability, or refuses, fails, or neglects to pay compensation during the period of employee's total temporary disability, such hearing may, upon written request by the injured employee, be set in the county wherein the injury occurred, or any adjoining county thereto wherein cases are to be set for hearing prior to the date of hearing in the county of injury.

All disputes arising under this act if not settled by the agreement of the parties interested therein, with the approval of the board, shall be determined by the board.

can make application to the Board for determination of the dispute. The Board is then required to set a hearing on the application. The statute goes on to state that all disputes under the statute not settled by agreement of the parties "shall be determined by the Board." Thus, since the parties had not agreed whether payments were properly terminated in February 1973, the Board, by statute, had to find in a hearing that there had been a change in conditions after the original agreement before it could be said that the company's duty to make further payments ceased on February 14, 1973. As a result, the court ruled that the limitation period did not run from the February 14, 1973, date, and Sissom's application was timely.

D. Necessity of Autopsies

The Indiana Workmen's Compensation Act contains a provision permitting autopsies.²³ The courts have attached a reasonable and necessary requirement to the granting of an autopsy under the statute.²⁴ In *Delaware Machinery & Tool Co. v. Yates*,²⁵ the Second District Court of Appeals discussed the "necessary" requirement at length. This was the first time an Indiana court had discussed this requirement. The court reviewed several cases from other jurisdictions and observed that autopsies were granted only if there was a strong showing by the requesting party that the autopsy would likely establish the disputed fact and that the truth could not be obtained through other evidence.²⁶ After reviewing the cases, the court applied those principles to this case and held that in order to be entitled to an autopsy the requesting party had to show (1) that the causal relationship between the particular action and death could not be determined from the evidence before the Board, and (2) that an autopsy would be likely to affirm or negate that causal link.²⁷ An

²³*Id.* § 22-3-3-6, which states in pertinent part:

The employer upon proper application, or the industrial board, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same; if, after a hearing, the industrial board orders an autopsy and such autopsy is refused by the surviving spouse or next of kin, in such event, any claim for compensation on account of such death shall be suspended and abated during such refusal.

²⁴*Delaware Mach. & Tool Co. v. Yates*, 158 Ind. App. 167, 301 N.E.2d 857 (1973); *McDermid v. Pearson Co.*, 107 Ind. App. 96, 21 N.E.2d 80 (1939); *General Am. Tank Car Corp. v. Zapala*, 104 Ind. App. 418, 10 N.E.2d 762 (1937).

²⁵351 N.E.2d 67 (Ind. Ct. App. 1976).

²⁶*Id.* at 73-74.

²⁷*Id.* at 74. In a brief concurring opinion, Judge Buchanan found the court's "strong showing of necessity-test" to be completely inconsistent with the express statutory language. *Id.* at 77 (Buchanan, J., concurring). See *Missouri Valley Bridge & Iron Co. v. Alsip*, 116 Ind. App. 259, 63 N.E.2d 297 (1945); *Town of Newburg v. Jones*, 115 Ind. App. 320, 58 N.E.2d 938 (1945), both of which indicated an absolute right to an

autopsy is not essential if there is sufficient external evidence to support a doctor's opinion that there is a causal relationship, even when other doctors draw a contrary inference.

E. Artificial Members

In another case of first impression, *Indiana & Michigan Electric Co. v. Miller*,²⁸ the Second District Court of Appeals suggested the legislature amend section 22-3-3-4 of the Indiana Code,²⁹ which requires an employer to furnish artificial members to employees injured on the job who require them. In *Indiana & Michigan Electric*, a press handle struck the claimant in the mouth, breaking two caps off of his teeth. The claimant was treated by a dentist who inserted two porcelain and gold crowns. The Industrial Board ordered the employer to pay for the dental expenses. The court of appeals reversed, holding that the expenses were not occasioned by personal injury. The court observed that no Indiana cases had considered the issue of whether compensation could be given for damage to artificial members. In reviewing the statute, the court noted that it specifically stated that in the case of "loss of *natural teeth*"³⁰ the employer must furnish an artificial replacement. Permanent attachment to the human body did not make an artificial member natural; thus, compensation was denied. The court regretted its conclusion and recognized its unfairness to workers whose artificial members are damaged in otherwise compensable accidents.³¹ However, it held that correction of such an inequity could only be remedied by the legislature, and it rightfully suggested that the legislature address this problem.

autopsy provided the procedure adopted is reasonable both as to time and occasion of its exercise, and proper notice thereof is given.

²⁸363 N.E.2d 1053 (Ind. Ct. App. 1977).

²⁹IND. CODE § 22-3-3-4 (1976) provides in pertinent part: "Where a compensable injury results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of natural teeth, employer shall furnish an artificial member, and where required, proper braces."

³⁰*Id.* (emphasis added).

³¹This inequity was noted several years ago in B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 8.7 (1950).

